Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOLICOEUR FURNITURE CO.
and JAMES ZAGRODNY,
Petitioners,

v.

CITY OF WOONSOCKET, RHODE ISLAND,
CHARLES C. BALDELLI and N. DAVID BOULEY,
Respondents.

Petition for a Writ of Certiorari to the Rhode Island Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER A SUBSTANTIVE DUE PROCESS VIOLATION CAN BE ESTABLISHED BY SHOWING THAT LOCAL GOVERNMENT OFFICIALS ENGAGED IN DELIBERATELY UNLAWFUL AND ARBITRARY ACTIONS THAT DEPRIVED A PERSON OF ALL USE OF HIS PRIVATE PROPERTY, OR WHETHER, IN ADDITION, A PLAINTIFF IS REQUIRED TO SHOW THAT SUCH ARBITRARY CONDUCT WAS SO EXTREME AS TO "SHOCK THE CONSCIENCE."

II. WHETHER A STATE SUPREME COURT MAY INVALIDATE A JURY'S VERDICT FOR DAMAGES UNDER 42 U.S.C. § 1983 AND COURT-AWARDED ATTORNEYS FEES UNDER § 1988 FOR VIOLATIONS OF THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT ON THE GROUNDS THAT THE TAKING OF PETITIONERS' PRIVATE PROPERTY RIGHTS DOES NOT AFFECT ANY FUNDAMENTAL CIVIL RIGHTS, AND THAT PETITIONERS ARE NOT MEMBERS OF ANY DISTINCT, OPPRESSED MINORITY GROUP.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Jolicoeur Furniture Company and James Zagrodny respectfully pray that a writ of certiorari issue to review the judgment of the Rhode Island Supreme Court in this case.

OPINIONS BELOW

The opinion of the Rhode Island Supreme Court is reported at 653 A.2d 740 (1995) and is reprinted in the Appendix to this petition (Pet. App.) at 1a.

JURISDICTION

The judgment of the Rhode Island Supreme Court was entered on February 6, 1995. A motion for reargument was denied on April 27, 1995. On July 13, 1995, Justice Souter extended the time for filing the instant petition

to August 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> [N]or shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section 1:

> [N]or shall any State deprive any person of life, liberty or property without due process of law.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case arises out of a land dispute in the City of Woonsocket, Rhode Island. Since 1946, the Jolicoeur Furniture Company operated as a retail furniture store on the corner of Bernon and Front Streets in downtown Woonsocket. Petitioner James Zagrodny worked at the store since 1969 and managed it for approximately a decade before the events in question. Pet. App. 2a.[1]

In April 1984, Jolicoeur learned that the State of Rhode Island intended to acquire the site of its furniture store

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[1] In the Rhode Island Supreme Court, each party filed a separate appendix. References to plaintiffs' appendix are noted as "PA." References to defendants' appendix are noted as "DA."

through eminent domain proceedings in order to reconstruct the City's Bernon Street Bridge ("the Bernon Street Bridge project"). At that time, Zagrodny sought a new location for the store. He consulted with Joel D. Mathews, then the Director of the Department of Planning and Development ("DPD") for Woonsocket. Mathews made Zagrodny aware of a prospective site comprised of three continguous lots in the downtown area: lots 155 and 291, which were owned by the City, and lot 154, which was privately owned. (PA 6, at 56, 96-98, 102.) In a May 29, 1985 letter to the City Council, Mathews recommended that the City sell lot 155 to Jolicoeur. Mathews advised the City Council that such a sale should hinge upon Zagrodny obtaining title to the privately-owned lot 154. He further recommended that sale be conditioned on "receipt and approval of plans by the Department of Planning & Development to insure that the proposed construction is in harmony with the other buildings in this downtown location." (PA 11.)

On October 7, 1985, the City Council enacted an ordinance authorizing the sale of lot 155 and a portion of lot 291 ("the Property") to the highest bidder at public auction at the assessed value of $16,000. At the auction on November 26, 1995, Zagrodny, on behalf of Jolicoeur, made the highest bid—$15,100. The same day he tendered a check for the full amount to the City Treasurer. The check was refused on the ground that the City Council had not yet approved the sale. On November 27, Zagrodny tendered a "binder" check to the City Treasurer in the amount of $1,500, together with a letter conditioning acceptance of the City's offer on (1) Jolicoeur's purchase of lot 154 from its private owner, and (2) the City's restoration of lot 155 to its original condition by removing a temporary state construction easement that was due to expire by April 2, 1986. (PA 6, at 103-11.) The City Treasurer accepted Jolicoeur's binder, signed a document accepting Jolicoeur's conditions, and forwarded the results of the auction to the City Council for approval. (DA 86.)

On January 21, 1986, the City Council unanimously enacted an ordinance agreeing to sell lot 155 to Jolicoeur for $11,000 and a portion of lot 291 for $5,600. (DA 82, Exh. 4B.) The sale was subject to "any and all . . . easements," and was further conditioned on "the submittance and approval of all plans by the Department of Planning & Development and the obtainment of all permits as required to implement [Jolicoeur's] proposal." The ordinance also specifically provided that "[t]he City Treasurer is hereby authorized and empowered on behalf of the City of Woonsocket to sign, seal, acknowledge and deliver a quitclaim deed to James W. Zagrodny upon payment in cash or certified check." The ordinance contained no deadlines for the sale to be completed, for Jolicoeur to submit plans to DPD, or for Jolicoeur to obtain the necessary permits to construct the new furniture store. Respondent Baldelli, Mayor of Woonsocket, signed and approved the ordinance on January 24, 1986. (DA 80-2, Exh. 4B.)

When the ordinance was enacted in January 1986, the State of Rhode Island held a $1 temporary easement on lot 155 to allow for the storing of construction equipment used by the State Department of Transportation ("DOT") in connection with the Bernon Street Bridge project. (PA 13A & 14, Exhs. 39A and 41.) Because the easement was scheduled to expire on April 2, 1986, the City and Zagrodny initially contemplated closing the sale upon expiration. After the easement was extended by DOT, however, Jolicoeur gave notice that it wanted to take title while the easement was still in place.

Although this demand was consistent with the January 1986 ordinance, which provided that the Property "shall be sold and conveyed subject to any and all . . . easements," the City refused to close the deal, apparently because of its mistaken belief that the extended easement effectively prevented Jolicoeur from rebuilding the furniture

store for as long as it existed.[2] Thus, on September 3, 1986, Mayor Baldelli wrote to the DOT and stated:

> For your information, *legally binding agreements* were entered into by the City and Jolicoeur Furniture to sell this land for the purpose of the construction of a new Jolicoeur Furniture Showroom and Warehouse at this location. *Unfortunately, this cannot take place because of the "snafu" surrounding this extended easement.*

(DA 87, Exh. 8 (emphasis added).) In August, 1986, acting in reliance on the City's agreement to convey the project and while waiting for either the easement to expire or for the City to honor its obligation (and Jolicoeur's request) to convey title to the Property notwithstanding the easement, Jolicoeur purchased lot 154 (located between lots 155 and 291) from its private owner. (PA 6, at 105-06.)[3]

However, in November 1986 the City learned it had made an embarrassing mistake: the very land it had agreed to sell to Jolicoeur was supposed to be the gateway to the proposed new Blackstone River Valley National Heritage Corridor Park. (PA 6, at 484-85; PA 16, Exh. 1.) To make matters worse, Mayor Baldelli's recent election campaign had touted the creation of this park as a cornerstone of the City's redevelopment efforts. (PA 6, at 434, 571.) Moreover, the pending conveyance to Jolicoeur would adversely affect the City's ability to

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[2] In fact, the easement did not prevent Jolicoeur from building its furniture store. DOT and its contractor, Aetna Bridge Company, would have agreed to move the easement and/or the equipment stored on the Property to allow the furniture store to be built. (PA 6, at 247-50.) In fact, Zagrodny offered to pay for the expense of moving the materials. (*Id.*)

[3] In reliance on its contract with the City, in or about May, 1987, Jolicoeur, at its own expense, had the unused gas station sitting on lot 154 demolished and removed in preparation for constructing part of the new furniture store thereon. (PA 6, at 106.)

obtain State funds to establish this much-heralded project. (DA 96, Exh. 15.)

Robert Bendick, the Director of the State Department of Environmental Management ("DEM"), was furious. By letter dated November 5, 1986, he told the City, via Mayor Baldelli and Planning Director Bouley (who by now had replaced Mathews), that the City's proposed conveyance of the Property to Jolicoeur "is *not* acceptable to the Department [DEM], is not supportive of the concept of the Blackstone Valley Linear Park and, I believe, represents poor planning on the City's part." He urged defendant Bouley to "ask your staff . . . to look at other alternatives and *that any further action on conveying the land already owned by the City* [*i.e., the Property*] *be suspended until this matter is resolved.*" (PA 16, Exh. 11.)

This potential loss of state funding for the proposed park, and the consequent loss of face to the Mayor whose election campaign and Planning Department had championed the proposed park, caused respondents Baldelli and Bouley to withdraw their previous support of the City's promise to convey the Property to Jolicoeur. (PA 6, at 434, 485-86, 571.) From this point on, while giving lip service to honoring the City's "legally binding" agreement with Jolicoeur, respondents first attempted to foist other possible furniture store locations on Jolicoeur and then, vexed by Jolicoeur's insistence that the City abide by its agreement, and unwilling to take the Property by eminent domain, respondents used every means at their disposal to avoid or frustrate the parties' performance of their contractual obligations. (PA 2.)

Thus, in June of 1987, at the behest of the Mayor and his Planning Department, the City Council unilaterally modified the contract. Despite the continuation of the same DOT easement which they had previously invoked to delay conveyance of the Property, the City Council

passed a second ordinance which suddenly required Jolicoeur to submit "acceptable" building plans to the City's Planning Department within 60 days, thereby establishing a new compliance deadline for Jolicoeur of August 25, 1987. (DA 83-84, Exh. 4C.) Moreover, as Jolicoeur soon learned, "acceptable" plans no longer meant simply that the proposed building was to be in harmony with the existing buildings in this industrial area, as the previous planning Director Mathews had earlier suggested. (PA 6, at 144-50.) Now, to obtain DPD's approval, Jolicoeur had to dedicate portions of the Property to public use and to conform to a list of confiscatory, park-related conditions prepared by the DPD. According to this list, Jolicoeur would have to, among other things, allow a portion of the Property to be used as a public parking lot and as an entrance to the proposed River Island Park; to provide landscaping and install lighting for the proposed park; to move his building so close to the highway that it would be as far away as possible from the proposed park; to squeeze the furniture store into the narrowest corner of the Property ("toward Market Square") so that it would be away from the entrance to the proposed park; and to plant "appropriate buffers" between the store and the proposed park. (PA 17, Exh. 19.) All of these park-related conditions, which were confiscatory and unlawful, created expensive new problems for the design and construction of Jolicoeur's furniture store.

Initially, Jolicoeur and the City could not even agree on where the footprint of the building would be located, much less what it would look like. However, when Jolicoeur reluctantly acceded to many of the Planning Department's conditions, DPD's Bouley set the trap by writing to the City Council (with a copy to Jolicoeur) and recommending that the City give Jolicoeur more time to submit acceptable plans while the parties continued to meet and while Jolicoeur's engineer redesigned the furni-

ture store to conform to the City's park-related mandates. (DA 100-01, Exh. 20.) After meeting with Jolicoeur and reviewing its building plans, the City Council responded by enacting an ordinance to extend the August 25, 1987 deadline. (DA 85, Exh. 4D.) However, as soon as the August 25 deadline passed Mayor Baldelli vetoed the ordinance, insisting that Jolicoeur had forfeited its rights to the Property. (PA 6, at 183-85.)[4] Bouley then opposed Jolicoeur's zoning board application for a use variance (which the City's zoning board granted anyway) (DA 103-04, Exh. 26) and physically threw Jolicoeur's furniture store plans out into the hall of the Planning Department. After the City Council failed to override the Mayor's veto, the City refused to honor its agreement to convey the land to Jolicoeur, despite Jolicoeur's tender of the balance due. Instead, Respondents declared the Jolicoeur agreement to be legally dead, and caused the City to execute an "Encumbrance Contract" with DEM in which the City agreed to devote the two lots it had promised to Jolicoeur to the development of the Blackstone River State Park and National Heritage Corridor in exchange for a State grant of $50,000.

In December of 1987, Jolicoeur and Zagrodny filed this action to compel the transfer of the Property and to obtain redress for the damages they had suffered as a result of respondents' misconduct. The complaint alleged breach of contract and tortious interference with contractual relations under Rhode Island law. The complaint also alleged causes of action under 42 U.S.C. § 1983 for violation of petitioners' substantive due process rights under the Fourteenth Amendment, for a taking of petitioners' private property without just compensation in violation of the Fifth Amendment, and for impairment

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[4] After a meeting, the City Council voted not to override Mayor Baldelli's veto. At that meeting, Baldelli urged the Council to ignore the City's obligations to Jolicoeur. (DA 162-63, Exh. 45, pp. 31-32.)

of petitioners' contract rights. The complaint sought compensatory and punitive damages under § 1983, and attorneys fees pursuant to 42 U.S.C. § 1988.

In 1988, by agreement of the parties, the trial was bifurcated. The issue whether a breach of contract had occurred and, if so, whether specific performance was an appropriate remedy, were tried to the court in 1989. The trial court ruled that a valid contract had been created between the parties and that the City had breached the contract. After voiding the City's attempt to impose park-related conditions, the August 25 deadline for submitting plans in compliance therewith, and the inapplicable "design overlay" ordinance, the Court ordered specific performance, and in 1990 entered a final judgment on these issues in favor of Jolicoeur. Pet. App. 13a.

In 1992, the remaining liability claims and the damages issues were tried before a jury. The jury found against respondents on the breach of contract, tortious interference and federal constitutional claims, and returned a compensatory damages verdict in favor of Jolicoeur and Zagrodny in the amount of $340,000, and punitive damages verdicts in the amount of $30,000 against the individual defendants. Pet. App. 9a, 37a-38a. The trial court then awarded attorneys fees pursuant to 42 U.S.C. § 1988, in the amount of $174,182.30, Pet. App. 10a, 42a, together with prejudgment interest dating from the City's unlawful actions in 1987 when it imposed unilateral and unlawful conditions on the City's contractual obligations to transfer the Property.

On appeal, the Rhode Island Supreme Court affirmed the judgment for breach of contract and tortious interference with contractual relations and the jury award of $340,000 in compensatory damages.[5] The court, how-

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[5] The trial court had ordered that a portion of this amount be conditioned on petitioners starting and completing the new store by certain dates. The Rhode Island Supreme Court reversed this

ever, reversed the judgments for petitioners on the Section 1983 claims. With respect to petitioners' substantive due process allegations, the court concluded that substantive due process is violated only in extreme cases that "shocked the conscience," and that respondents' conduct, however unlawful and arbitrary, did not rise to that level. Pet. App. 19a. In particular, the court believed that respondents' efforts to impose impossible obstacles in petitioners' path were "not incomprehensible" in light of the pressure imposed by the State's environmental authorities. With respect to petitioners' takings allegations, the Rhode Island Supreme Court held that Section 1983 did not provide a cause of action, because just compensation claims involve purely private rights, petitioners were not members of any distinct, oppressed minority group, and Section 1983 is available to vindicate only "a fundamental civil right such as voting rights, jury or job discrimination, school desegregation, or the like." Pet. App. 17a (internal quotation omitted).

REASONS FOR GRANTING THE PETITION

The Rhode Island Supreme Court's decision raises two fundamental issues of federal law, each of which warrants review by this Court. First, the court ruled that public officials may deliberately and arbitrarily deprive a private citizen of his private property without running afoul of the substantive protections contained in the Due Process Clause, so long as, in doing so, their intentional misconduct does not "shock the conscience." This approach, while consistent with that adopted in two federal circuits, is sharply at odds with the rule in other circuits. This is an important issue that needs to be resolved.

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ruling, restoring the jury's award of $340,000 in compensatory damages. However, the Court also reduced that trial court's award of pre-judgment interest by lopping off the entire two and one-half year period between August 1987 (when the City breached the contract) and December 1989 (when the Court ordered specific performance).

Second, the Rhode Island Supreme Court held that a taking of property in violation of the Fifth Amendment, such as that found here in the trial court, is not actionable under Section 1983 because it involves only private rights, and because petitioners were not asserting a fundamental civil right, and were not members of an oppressed minority group. This ruling is not only plainly wrong and in need of correction, but it represents a persistent, albeit minority, view followed by several states who have adopted a crabbed reading of Section 1983 in cases involving the unlawful deprivation of property rights.

1. There are compelling reasons why this Court should review the Rhode Island Supreme Court's decision that petitioners failed to prove a substantive constitutional claim directly under the Fourteenth Amendment. That ruling involves an important and recurring issue of constitutional law on which there is substantial disagreement among the Circuits.

There is general agreement that some forms of intentional governmental mistreatment of citizens constitute deprivations of substantive due process, merely because of the nature of the conduct and regardless of the procedures or remedies that may be available under state law. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990) ("[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'") (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). There is, however, substantial disagreement as to the appropriate standard to be applied to substantive due process challenges to state action involving land use issues. The Rhode Island Supreme Court applied an extremely deferential standard, concluding that the Fourteenth Amendment was violated only if the official conduct at issue was so outrageous as to "shock the conscience." Pet. App. 19a. This standard is in

accord with that applied in the First Circuit, which has repeatedly held that state land use decisions may not be challenged under the Due Process Clause except, perhaps, in extreme cases where abuses of power "shock the conscience." *See Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992) (unless state action "shocks the conscience," substantive due process "may not ordinarily be used to involve federal courts in the rights and wrongs of local planning disputes"); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir.) (same), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992); *Amsden v. Moran*, 904 F.2d 748, 753-54 (1st Cir. 1990), *cert. denied*, 498 U.S. 936 (1991); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982). The Eighth Circuit has also adopted this standard. *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992).

On the other hand, the Third Circuit applies a sharply different rule, which simply requires that the government have acted "arbitrarily"—*i.e.*, for intentionally illegitimate reasons—without any additional "shock the conscience" requirement. *See DeBlasio v. Zoning Bd. of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995). In *DeBlasio*, the Third Circuit set forth the following standard:

> Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a landowning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

53 F.3d at 601. *See also Bello v. Walker*, 840 F.2d 1124 (3d Cir.), *cert. denied*, 488 U.S. 851, 488 U.S. 868 (1988); *Neiderhiser v. Borough of Berwick*, 840

F.2d 213, 218 (3d Cir.), *cert. denied*, 488 U.S. 822 (1988). The conflict between the Third Circuit rule and the rule applied by the Rhode Island Supreme Court in this case is particularly striking. As in the instant case, the Third Circuit cases involved allegations that local officials had "improperly interfered with the process by which the municipality issued building permits, and that they did so for . . . reasons unrelated to the merits of the application for the permits." *Bello*, 840 F.2d at 1129. *See also DeBlasio*, 53 F.3d at 594-96. The Second Circuit applies a similar standard. *See Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988).

The Ninth Circuit applies a variant of the Third Circuit standard. *See Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407-10 (9th Cir. 1989) ("fourteenth amendment's due process clause protects property no less than life and liberty" and prohibits arbitrary or malicious government action that works a deprivation of property rights), *cert. denied*, 494 U.S. 1016 (1990); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir. 1991) (challenger "must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare") (internal quotation omitted), *vacated and remanded*, 113 S. Ct. 31 (1992), *relevant holding adhered to on remand*, 987 F.2d 662, 663 (9th Cir. 1993); *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 512-14 (9th Cir. 1990). Although the precise phrasing of the standard is somewhat more stringent than that of the Third Circuit, these decisions have uniformly permitted substantive due process claims to proceed in land-use cases in the absence of "shock the conscience" evidence, whereas the First Circuit has routinely rejected such claims.[6]

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[6] The law of the Sixth Circuit is unclear. *Compare Harris v. City of Akron*, 20 F.3d 1396, 1405 (6th Cir. 1994) (recognizing

The Seventh Circuit has recently adopted a third position on this question, going even further than Rhode Island and the First Circuit to hold that substantive due process affords *no* independent constitutional ground for relief in cases involving alleged infringements of property rights by arbitrary government action. *See Mid-American Waste Systems, Inc. v. City of Gary, Indiana*, 49 F.3d 286 (7th Cir. 1995). Rejecting a substantive due process challenge to allegedly arbitrary official conduct that destroyed the value of a leasehold interest, the Seventh Circuit concluded that "[w]hatever scope 'substantive due process' has for cases of personal liberty, it has none in business law beyond ensuring that states pay just compensation for property interests they take—and perhaps ensuring that states do not take private property for private use." 49 F.3d at 291.

The choice of standard is outcome-determinative in this case. Having admitted in 1987 that a binding contract to convey the Property to Jolicoeur existed, respondents' efforts to frustrate conveyance of the Property to petitioners was plainly arbitrary. But the trial judge and the jury found it to be intentional and in bad faith, as is evidenced by the award of punitive damages on the Section 1983 claims and the trial judge's finding that respondents' conduct was "heinous." [7] Respondents' actions

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"two types of substantive due process violations: (1) official acts that are unreasonable and arbitrary and may not take place no matter what procedural protections accompany them, and (2) official conduct that shocks the conscience") (internal quotation omitted), *with Mertik v. Blalock*, 983 F.2d 1353, 1367-68 (6th Cir. 1993) ("shocks the conscience" test); *McMaster v. Cabinet for Human Resources*, 824 F.2d 518, 522 (6th Cir. 1987) (same).

[7] The jury was instructed that: "In addition to actual damages, the law permits you in certain circumstances to award of the plaintiffs what are known as punitive or exemplary damages. Such damages are awarded in proper and specified instances in order to punish a wrongdoer for some extraordinary misconduct and to

were certainly arbitrary in the sense identified by the Third Circuit in *Bello*, where the defendants had "improperly interfered with the process by which the municipality issued building permits, and that they did so for . . . reasons unrelated to the merits of the application for the permits." *Bello*, 840 F.2d at 1129.

The Rhode Island Supreme Court nevertheless found that respondents' conduct, though improper, did not "shock the conscience" because respondents had placed themselves in a difficult position by agreeing to convey the Property to petitioners despite their preferred desire to obtain park funding from the State. Pet. App. 19a. In so doing, it drew a distinction between the legal malice that sufficed to support a finding of intentional interference with contractual relations and the somehow greater wrongfulness required to create a substantive due process violation. [*Compare* Pet. App. 21a-22a with Pet. App. 18a-19a.] It thus took the view that public officials may engage in intentional and arbitrary misconduct—exemplified by respondents' double-dealing to nullify the binding contract with Jolicoeur through arbitrary and wholly improper means—without offending any constitutional limits, unless some extreme "shock the conscience" standard is met.

Resolution of the conflict among the circuits on the proper standard for substantive due process challenges to land use decisions is a matter of pressing importance. This Court has previously granted certiorari on this question, but the case did not result in a ruling on the merits. *See PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992). Since 1992, divergence in the courts of appeals has grown worse, as the Third Circuit's recent decision in *DeBlasio*,

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warn others not to engage in some similar conduct in the future. In this case, you may award punitive damages only against defendants Baldelli and Bouley."

and the Seventh Circuit's sharply divergent ruling in *Mid-America*, make clear. The issue arises again and again in federal and state courts, and poses questions of great constitutional significance. Thus, all considerations favor plenary review on this issue alone.

2. This Court should also review the Rhode Island Supreme Court's holding that petitioners failed to state a takings claim pursuant to Section 1983.[8] The court below specifically held that "certain Fourteenth Amendment constitutional claims [are] not actionable under 42 U.S.C. § 1983 because they involve[] private rather than public rights." Pet. App. 16a. Because petitioners' claims do not "affect a fundamental civil right such as voting rights, jury or job discrimination, school desegregation or the like," the court concluded that Section 1983 did not provide a cause of action for the deprivation of private property without just compensation. Pet. App. 17a (internal quotation omitted). In this respect, the Rhode Island Supreme Court expressly followed the decision of the South Dakota Supreme Court in *Boland v. City of Rapid City*, 315 N.W.2d 496, 503 (S.D. 1982), which similarly held that "[w]e do not believe that . . . sections 1983 and 1988 include[] condemnation and inverse condemnation under color of state law."

As a general matter, however, it is well established that Section 1983 provides a cause of action for all deprivations of a right, privilege or immunity secured by the Constitution or laws of the United States—with limited exceptions not relevant here—and not merely to claims involving public or civil rights. *See Dennis v. Higgins*,

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[8] This issue remained a live one at the time of the state court appeal because petitioners claimed that the damages awarded to them pursuant to state law did not constitute full compensation for their temporary loss of their equitable right to the property at issue. At a minimum, by denying petitioners any prejudgment interest during the period of the takings, the Rhode Island Supreme Court has rendered the common law remedies inadequate and thus failed to award "just compensation."

498 U.S. 439 (1991) (Section 1983 encompasses dormant commerce clause challenges to state business regulations). Nothing in the text of Section 1983, its legislative history, or this Court's decisions supports the Rhode Island Supreme Court's effort to strip just compensation claims from the scope of this remedy.

To the contrary, this Court has ruled that the right to enjoy private property without unwarranted interference is enforceable under Section 1983. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Indeed, "the dichotomy between personal liberties and property rights is a false one." *Id.* at 552.

A number of federal circuits have specifically held that Section 1983 provides a cause of action for violations of the Just Compensation Clause. *See, e.g., A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987); *Dodd v. Hood River County*, 1995 WL 383490 (9th Cir. June 29, 1995); *Scott v. Greenville County*, 716 F.2d 1409, 1413-14, 1419-20 (4th Cir. 1983); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100-01 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982).

The Rhode Island Supreme Court's contrary ruling, though in accord with that of the South Dakota Supreme Court, conflicts with the applicable rule in these federal circuits, and warrants review for this additional reason. Review is particularly needed to ensure that Section 1983 cases in state court are treated the same as those brought in federal jurisdictions. *Cf. P.L.S. Partners, Women's Medical Center of Rhode Island, Inc. v. City of Cranston*, 696 F. Supp. 788, 790, 795-97 (D.R.I. 1988). Just compensation claims are certain to recur, and are particularly likely to arise in state court in conjunction with state law claims because a just compensation claim

must be predicated on exhaustion of adequate state compensatory mechanisms.[9]

Alternatively, to the extent the Rhode Island Supreme Court's decision was intended as a substantive ruling that petitioners had not suffered a taking—rather than a procedural ruling that Section 1983 does not provide a cause of action for takings claims—it was plainly incorrect.[10] By definition, a takings claim will always involve a private interest. The very point of the Takings Clause is to protect "private property" from confiscatory government action—including temporary takings of the kind that occurred in this case. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

The mere fact that petitioners had common law claims which were "actionable and compensable" under state law (Pet. App. 18a) does not negate the constitutional claims. Having brought state contract and tort claims, as well as Section 1983 claims, in state court, petitioners have resorted to state remedies for the City's taking, and those state proceedings are over.[11] The question before

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[9] Two of the cases on which the Rhode Island Supreme Court relied—*Welsh v. City of Orono*, 355 N.W.2d 117, 124 (Minn. 1984) and *Van Emmerik v. Montana Dakota Utilities Co.*, 332 N.W.2d 279, 284 (S.D. 1983), *cert. denied*, 464 U.S. 915 (1983)—actually held that, whatever the proper scope of section 1983, attorneys fees were available pursuant to 42 U.S.C. § 1988 only in cases where the prevailing plaintiff's claims actually advanced a broad public interest. Although the Rhode Island Supreme Court did not expressly adopt this rationale, its ruling cannot be defended on this basis. It is well established that prevailing parties are entitled to attorneys fees under Section 1988 irrespective of the nature of their Section 1983 claims.

[10] As noted, the Rhode Island Supreme Court refused to consider the Fifth Amendment takings claim because it was a "private claim that address[ed] no public right or interest and [was] actionable and compensable under state law." Pet. App. 18a.

[11] Thus, the claims are plainly ripe.

the Rhode Island Supreme Court—which it refused to reach—was not whether petitioners had in fact suffered a "taking" of their property—clearly they had—but whether they had in fact received "just compensation" for the taking of their property notwithstanding the damages award they obtained via their breach of contract and/or tortious interference claims.

Denial of all compensation under state common law causes of action for property deprivation is not a prerequisite to a just compensation claim. A party whose property has been taken states a claim under the Fifth Amendment when compensation is not "just" because it is incomplete or inadequate. "Just compensation requires payment of the full monetary equivalent of the property taken." *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 583 (9th Cir. 1991). *See United States v. Reynolds*, 397 U.S. 14, 16 (1970). Here, by failing to award any prejudgment interest during the taking period, the compensation was neither just nor fair because respondents have been denied "the full monetary equivalent of the property taken." Thus, the constitutional just compensation claim was properly before the Rhode Island Supreme Court, which in turn had an obligation to decide on the merits whether petitioners had received the full and adequate monetary equivalent of the Property taken.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

February 6, 1995

SUPREME COURT

No. 93-143-Appeal

(PC 87-5690)

JOLICOEUR FURNITURE CO., INC., *et al.*

v.

CHARLES C. BALDELLI, *et al.*

OPINION

LEDERBERG, J. This case came before the Supreme Court on the appeal of the city of Woonsocket, Charles C. Baldelli, N. David Bouley, and Albert Brien (defendants) and on the cross-appeal of Jolicoeur Furniture Co., Inc., and James Zagrodny (plaintiffs) from a judgment of the Superior Court that ordered the defendants City of Woonsocket, Charles C. Baldelli, and N. David Bouley to pay compensatory damages plus interest, ordered Charles C. Baldelli and N. David Bouley to pay punitive damages, and awarded attorneys' fees and expenses to the plaintiffs. We affirm in part and reverse in part.

FACTS

The facts, insofar as pertinent to the appeals, follow.

Beginning in 1946, Donald and Violet Schafrath (the Schafraths) owned and operated Jolicoeur Furniture Co., Inc. (Jolicoeur), a retail furniture store on the corner of

Bernon and Front Streets in the city of Woonsocket, Rhode Island. James Zagrodny (Zagrodny), the owners' nephew, began to work at the store full time around 1969 and, by the mid-1980s, began to manage the store in anticipation of the Schafraths' retirement.

In April 1984, the Schafraths learned that the State of Rhode Island intended to acquire the site of the furniture store in order to reconstruct the Bernon Street Bridge, and consequently Zagrodny sought alternative locations for the store. After rejecting suggestions by the State Department of Transportation (DOT), Zagrodny contacted the city of Woonsocket for assistance in finding a location. In February 1985, Joel D. Mathews (Mathews), then the director of the Department of Planning and Development (DPD), suggested three contiguous lots, Nos. 291, 155, and 154, a short walk from Jolicoeur's old location and strategically located on Armory Street within the "hub" of the city's commercial and business district. Two of the lots, Nos. 291 and 155, were owned by the city, whereas the third, lot No. 154, was privately owned. Because no single lot could accommodate a new store, Zagrodny testified that this site would only have been acceptable if he were able to obtain all three lots.

Mathews sent a letter dated May 29, 1985, to the Woonsocket City Council (council), suggesting that the city sell city lot No. 155 to Jolicoeur and noting that such a sale should be contingent on Jolicoeur's acquisition of the privately owned lot No. 154. Mathews further recommended that such a sale be approved by the council and be conditioned on the DPD's approval of the plans for the site to ensure that the new store was "in harmony with the other buildings in [the] downtown location."

On October 7, 1985, the council passed an amendment to an ordinance authorizing "the City Treasurer * * * to sell at public auction to the highest responsible bidder

* * * real estate * * * designated as follows: Lot 155 * * * [$11,000]. Portion of Lot 291 * * * $5,600. * * * Said [lots] shall be sold as a singular package." The sale was conditioned on "the submittance and approval of all plans by the Department of Planning & Development and the obtainment of all permits as required to implement the bidder's proposal." The auction took place on November 26, 1985. Zagrodny submitted the highest bid and attempted to tender a bank check to the city treasurer for the full purchase price, but the city treasurer informed Zagrodny that approval of the sale by the council was required before the deeds to the lots could be transferred.

On the next day Zagrodny tendered a check for $1,500 to the city treasurer and presented a letter that conditioned Jolicoeur's acceptance of the sale offer on Jolicoeur's ability to purchase lot No. 154 from its private owner. The letter also stated that city-owned lot No. 155 should be restored to its original condition as it existed prior to the construction of the Bernon Street Bridge. Zagrodny's proviso referred to an easement taken by the DOT on lot No. 155, which easement was scheduled to expire on April 2, 1986. The city treasurer accepted Jolicoeur's deposit check (referred to by Zagrodny as a "binder" in his letter) and forwarded the results of the auction along with the conditions listed by Zagrodny to the council.

On January 21, 1986, the council enacted City Ordinance Chapter 4500 (ordinance 4500), authorizing the city treasurer to sell to Zagrodny as a single package lot No. 155 for $11,000 and a portion of lot No. 291 for $5,600 "upon payment in cash or certified check." The sale was to be conditioned upon the "submittance and approval of all plans by the Department of Planning & Development," and the parcels were to be conveyed subject to any easements.

Ordinance 4500 did not, however, specify the nature and extent of the plans that were required, nor did the

ordinance provide standards or guidelines to govern the DPD's approval of any submitted plans. Mathews, nevertheless, told Zagrodny that the DPD's standard would be whether the building proposed by the plans would be in harmony with the surrounding area, and Zagrodny testified that he understood the ordinance to mean that "the City was protecting themselves [*sic*] from letting anybody put up any particular type of building that they [*sic*] wanted." The ordinance mandated no time limits, deadlines, or temporal restrictions within which Zagrodny was required to fulfill the conditions set forth in the ordinance. The ordinance was signed by Charles C. Baldelli (Baldelli), mayor of Woonsocket (mayor), on January 24, 1986.

Initially, the city had refused to sell the property as long as the DOT held the easement for storage of equipment on lot No. 155. Baldelli wrote to the DOT on September 3, 1986, concerning the easement on lot No. 155 (mistakenly referred to as "Lot 55" in the mayor's letter): "For your information, *legally binding agreements were entered into by the City and Jolicoeur Furniture to sell this land* for the purpose of the construction of a new Jolicoeur Furniture Showroom and Warehouse at this location. Unfortunately, this cannot take place because of the 'snafu' surrounding this extended easement." (Emphasis added.)

In November 1986 a more serious problem than the DOT easement arose when the Rhode Island Department of Environmental Management (DEM), in a letter dated November 5, 1986, informed the mayor that DEM had just learned of the sale of the land to Zagrodny. The very land that the city had agreed to sell to Jolicoeur was the subject of a State of Rhode Island Heritage Bond Grant awarded to the city of Woonsocket for the construction of the proposed River Island Park project. The DEM found the situation unacceptable and requested that the mayor's staff meet with DEM and suspend fur-

ther action on conveying the land until the matter was resolved.

In addition to the letter, DEM also informed the DPD that if the city proceeded with its sale of the land to Jolicoeur, the state would not fund the Heritage Bond Grant that had been given to the city for construction of the park. The DEM also insinuated that if the sale were consummated, in addition to not funding the grant, DEM would use such a sale as leverage to deny further grants to the city. Thus, the sale of this land to Jolicoeur jeopardized not only the funding for River Island Park, but future funding for other parks and recreational areas as well. The DPD brought this potential threat to Woonsocket's continued receipt of state funds to the attention of the council and recommended that the council appease DEM because the DPD felt that the long-term benefits of the park to the city far outweighed those of the furniture store.

In response to this new development, Baldelli recommended that the city return the binder tendered by Zagrodny. Baldelli publicly stated that the sale of the land to Zagrodny was a "snafu" that he intended to correct immediately because of his commitment to the park.

On June 1, 1987, the council passed, and Baldelli signed, an amendment to ordinance 4500, the ordinance that had originally authorized the sale of land to Zagrodny. The amendment provided that the "authorization to sell shall expire 60 days after the passage of this ordinance unless [Zagrodny] shall have submitted to the Department of Planning & Development acceptable building design plans and obtained from the Zoning Board of Review necessary variances." The sixty-day deadline expired on August 25, 1987. On June 2, Zagrodny and his architect met with Nancy Brittain (Brittain) of the DPD. At this meeting, Zagrodny and Brittain discussed the placement of the building, its type, and certain con-

cessions the DPD wanted Zagrodny to make concerning the park. Brittain gave Zagrodny and his architect a list of ten "suggestions" for the property, none of which was listed in the ordinance. These "suggestions" included having Zagrodny install lighting to prevent vandalism, landscape the green area, share parking and an entrance with the park, and create a buffer between the property and the park. Brittain's list also included "suggestions" that the building have a brick facade and wooden window frames and be placed as far from the park as possible.

On August 20, 1987, the new director of the DPD, N. David Bouley (Bouley), wrote to the council that he had met with Brittain, Zagrodny, and Zagrodny's architect twice and had met with Zagrodny and Baldelli once. Bouley recommended that the city give Jolicoeur more time to submit acceptable plans while the parties continued to meet, although he expressly reserved the right to enforce the August 25, 1987 deadline if Zagrodny did not continue to recognize that the city was under no obligation to extend the deadline.

Approximately one week before the deadline, Zagrodny again met with Brittain and submitted a drawing to her. Brittain felt that these plans were not sufficient for the city planner to make a decision on whether to approve the building, and another meeting on August 25 failed to settle the matter. Despite the passage of the deadline date, the DPD did not call a halt to the process because it "didn't want to deadline then [*sic*] if [Zagrodny was] really diligently working on plans." Bouley testified that the letter of August 20, 1987, to the council administratively extended the deadline and that he had mailed a copy to Zagrodny. By September 1987, however, the DPD began to take the position that the deadline had expired and that the matter was, at that point, resolved because they had seen no new plans. The mayor's office took an identical position and wrote to the council that because the sixty-day deadline had passed, Zagrodny

should be held in default and his right to buy the land be forfeited.

Some members of the council disagreed, however, and arranged a "workshop" to which the DPD and Zagrodny were invited. The council instructed Zagrodny to submit his plans to the city's zoning board (the board) for its approval of a variance for the site, and the board subsequently unanimously approved Zagrodny's application.

The council met on November 16, 1987, shortly after the board approved Zagrodny's variance. At that meeting, the council again amended ordinance 4500 to allow Zagrodny until December 31, 1987, to submit acceptable building plans to the design-review board, an entity that was part of the city government and related to the DPD. The design-review board had not previously been part of the approval process.

Although Zagrodny did submit plans to the design-review board, Baldelli vetoed the November 16, 1987 amendment before the design-review board could reject or accept the plans. The mayor's veto message on December 9, 1987, explained that he had taken this action on the basis of his belief that the city was no longer under any obligation to sell the land to Jolicoeur because of Zagrodny's failure to fulfill the "contingent requirements of the initial agreement within the prescribed period of time." The council sustained the mayor's veto by one vote.

At some point in December 1987, Zagrodny attempted to submit the plans approved by the zoning board to Bouley, who "threw them right out the door" and told Zagrodny to "pick them up on [his] way out." During the same month, Zagrodny attempted to tender payment for the site to Albert Brien (Brien), the financial director for the city of Woonsocket. Brien did not accept Zagrodny's tender, whereupon Zagrodny obtained legal

counsel and began the process that has culminated before this court.

PROCEDURAL HISTORY

On December 24, 1987, plaintaiffs filed suit against defendants in Superior Court and, pursuant to Rule 65 of the Superior Court Rules of Civil Procedure, obtained a temporary restraining order enjoining defendants from, *inter alia*, selling, encumbering, or otherwise alienating any interest in lot No. 155 and a portion of lot No. 291. The plaintiffs' complaint alleged (1) that all defendants breached a contract for the sale of land between the city and plaintiffs, (2) that defendants Baldelli and Bouley tortiously interfered with plaintiffs' contract with the city, (3) that defendants Baldelli and Bouley tortiously interfered with plaintiffs' advantageous business relationship with the city, (4) that all defendants violated 42 U.S.C. § 1983 (Federal Civil Rights Act) for abridging plaintiffs' constitutionally protected property and contractual rights, and (5) that the city violated the impairment-of-contracts and just-compensations clauses of the State and Federal Constitutions.

In October 1988, the Superior Court granted plaintiffs' Rule 42(b) motion for a bifurcated trial and directed that the issues of liability and specific performance be tried by the court without a jury and that the issue of damages be tried before a jury. On July 31, 1989, the Superior Court justice found that "a binding legal contract * * * [existed] between the City and Jolicoeur Furniture Company which is to be complied with within a reasonable time subject only to the submission of plans to the Department of Planning and Development." Sometime between July 31 and December of 1989, plaintiffs complied by submitting plans. In December 1989 plaintiffs moved for entry of judgment pursuant to Rule 54(b) of the Superior Court Rules of Civil Procedure, arguing that a final judgment on the issues that were already

decided (1) would enable plaintiffs to obtain title and to use the property at issue, (2) would render a final judgment on the liability issue before expenses were incurred on a jury trial on the issue of damages, and (3) would simplify the jury trial by clarifying the issues already decided and by limiting the issues remaining. The Superior Court granted the motion and entered a judgment pursuant to Rule 54(b) on December 15, 1989, awarding plaintiffs "specific performance of the agreement to purchase Lot [No.] 155 and a portion of Lot [No.] 291 * * *." In addition, the judgment directed defendants to issue plaintiffs a building permit for the construction of a furniture store, forbade the application of the Design Overlay District ordinance to the properties at issue, voided the sixty-day deadline, voided other conditions imposed by defendants after the enactment of ordinance 4500, and voided all conditions related to the proposed park. Neither the city nor individual defendants appealed from this judgment.

In April 1992, following trial on the issue of damages, a jury found that plaintiffs had suffered monetary losses as a result of defendants' breach of contract and found that defendants Baldelli and Bouley had tortiously interfered with plaintiffs' contract. The jury further found, in response to interrogatories, that defendants city of Woonsocket, Baldelli, and Bouley had "violated plaintiffs' rights under the Federal Civil Rights Act; or [had violated] * * * plaintiffs' constitutional rights." The trial justice dismissed plaintiffs' claim that defendants Baldelli and Bouley tortiously interfered with plaintiffs' advantageous business relationship with the city. The jury awarded to plaintiffs compensatory damages in the amount of $340,000 and punitive damages of $15,000 against each of defendants Baldelli and Bouley.

The plaintiffs' request for an award of attorneys' fees and costs based on the finding of 42 U.S.C. § 1983 viola-

tions and defendants' motion for a new trial and motion to alter or amend the judgment were heard in June and July 1992. The defendants moved to alter or amend the judgment either by a remittitur or by imposing conditions on the payment of damages to ensure actual construction of a furniture store. In response, the Superior Court awarded attorneys' fees to plaintiffs, denied defendants' motion for a new trial, and denied in part and granted in part defendants' motion to alter or amend the judgment. The trial justice refused the request for a remittitur but proceeded to place conditions on the payment of damages. In August 1992, the Superior Court entered a final judgment awarding plaintiffs (1) compensatory damages in the sum of $311,460 with interest, (2) increased construction costs in the amount of $28,540 with interest, provided that plaintiffs would begin and complete construction by certain dates, (3) punitive damages in the sum of $15,000 each from defendants Baldelli and Bouley, and (4) attorneys' fees and costs in the sum of $174,182.

Pursuant to G.L. 1956 (1985 Reenactment) § 9-24-1, defendants appealed from the judgment, arguing that they were not subject to liability under 42 U.S.C. § 1983, that they were erroneously denied a jury trial on the breach-of-contract claim, that they did not violate any of plaintiffs' constitutional rights, that the jury instructions were prejudicial and erroneous, that defendants Baldelli and Bouley could not be held liable for tortious interference with the city's own contract, and finally, that the trial justice erroneously imposed interest upon the judgment. The defendants did not appeal any issue of state constitutional rights in respect to Baldelli's and Bouley's acts. The plaintiffs cross-appealed pursuant to § 9-24-1, contending that the trial court erroneously reduced the jury's award of compensatory damages and abused its discretion when it failed to base its attorneys' fees award on current billing rates or, alternatively, failed to add prejudgment interest to an award based on historic billing rates.

DENIAL OF A JURY TRIAL

I. The Rule 42(b) Order for Separate Trials

On appeal, defendants argued that on the breach-of-contract issue, they were erroneously denied their constitutional right to a jury trial as guaranteed by art. 1, sec. 15, of the Rhode Island Constitution. We disagree with defendants' conclusion.

Rule 38 subsections (a) and (b) of the Superior Court Rules of Civil Procedure provide that a party may demand a jury trial of any issue triable of right by a jury. This court has preserved a policy that favors jury trials and has required the determination of legal issues by a jury even in cases in which certain issues may be equitable. *Bendick v. Cambio,* 558 A.2d 941, 944 (R.I. 1989). Once a trial by jury has been demanded, "the consent of *all* parties is required to waive a trial by jury on the issues demanded." *Blazar v. Perkins,* 463 A.2d 203, 207 (R.I. 1983); Super. R. Civ. P. 38(d) and 39(a).

In the instant case, a jury trial was demanded by plaintiffs in their complaint and by defendants in their answer. Upon plaintiffs' Rule 42(b) motion for separate trials, the Superior Court issued an order in October 1988 stating that "[p]ursuant to Rule 42(b) of the Superior Court Rules of Civil Procedure, and *by agreement of the parties,*" separate trials would be held "regarding the issues of liability and damages." The same order directed, *inter alia,* that the "issues of liability and specific performance, as requested in * * * plaintiffs' demand for judgment in the Verified First Amended Complaint shall be tried and decided by the Court, *without a jury.*" (Emphases added.) In that demand for judgment, plaintiffs had requested a declaratory judgment that "defendants breached their agreement to sell and convey the Property to plaintiffs." Thus, the very language of the order indicated that both parties had agreed to try the issues of liability and specific performance without a jury.

Furthermore, our careful review of the record disclosed no appeal by defendants of the October 1988 order, thereby providing further evidence of their consent to a nonjury trial on the issue of liability. Under Rule 4 of the Supreme Court Rules of Appellate Procedure, a notice of appeal must be filed within twenty days of the date of the entry of an order. The "all-important condition precedent for the taking of an effective appeal is that such appeal should be timely[,]" and "[t]his means that an appeal should be taken within twenty days of the entry of the * * * order * * * from which the appeal is taken." Joseph R. Weisberger, *Rhode Island Appellate Practice*, commentary 4.1 at 19 (1993). Moreover, appeals may be taken "only from final judgments or orders which have such an element of finality that action is 'called for before the case is finally terminated in order to prevent clearly imminent and irreparable harm.'" *Id.* (quoting *Lincoln v. Cournoyer*, 118 R.I. 644, 648, 375 A.2d 410, 412-13 (1977)); *see* § 9-24-1.

The October 1988 order of the Superior Court terminated the rights of both parties to a jury trial on the issues of liability and specific performance. Because a timely appeal was necessary in order to prevent the "imminent and irreparable" harm of being deprived of a jury trial on the issues, the order had the requisite "element of finality." Yet defendants failed to satisfy the "all-important condition precedent" of filing an appeal within twenty days of the entry of the order.

Because both defendants and plaintiffs consented to a trial of the liability issue without a jury, the requirement of an effective waiver under Rules 38(d) and 39(a) has been met; and because defendants did not file a timely appeal from the Rule 42(b) order, they are precluded from asserting that they were denied their right to a jury trial on the breach-of-contract issue.

II. The Rule 54(b) Judgment

The defendants further argued that the Rule 54(b) judgment entered on December 15, 1989, by the Superior Court gave "no indication that a breach of contract had been found by the court" and that defendants were therefore prejudiced by the denial of a jury trial on that issue. The plaintiffs countered that the Rule 54(b) judgment was a final judgment on the breach-of-contract issue and that defendants' failure to appeal the judgment within the prescribed period bars them from raising the issue on appeal. We are of the opinion that the Rule 54(b) judgment in fact embodied a ruling on the breach-of-contract issue and properly awarded specific performance as a remedy.

At the December 14, 1989 hearing on the Rule 54(b) motion, the trial justice referred to "the breach, if it did take place—the breach took place obviously by the City—It's a question of when you're going to start itemizing the damages." In addition, the Rule 54(b) judgment entered on the following day unambiguously awarded plaintiffs "specific performance of the agreement to purchase Lot 155 and a portion of Lot 291 of Assessor's Plat 14." Specific performance, as a remedy, is "seldom granted unless there has been a breach of contract, either by nonperformance or by repudiation." *Restatement* (Second) *Contracts* § 357, comment (a) at 163 (1981); *see* 5A Arthur L. Corbin, *Corbin on Contracts* § 1141 (1964) ("[i]n most cases in which a decree for specific performance has been granted * * * an actual breach by the defendant has already occurred"). The comments of the trial justice, coupled with the award of specific performance, plainly contradict defendants' contention that they were given "no indication that a breach of contract had been found by the court." And even if the above evidence were not conclusive, paragraph (5) of the Rule 54(b) judgment leaves no doubt that the breach-of-contract issue had been decided. After awarding plain-

tiffs specific performance and voiding certain conditions imposed by defendants, the trial justice in paragraph (5) of the judgment directed that "all issues of *liability* relating to Counts II, III, IV and V of the Verified First Amended Complaint and all issues of *damages* relating to *all Counts* shall be tried before a jury on [date]." (Emphases added.) The inescapable conclusion from this paragraph is that the issue of *liability* in respect to *count I* (that alleged a breach of contract by all defendants) had already been adjudicated in the bench trial. Thus, we conclude that the Rule 54(b) judgment provided ample notice to defendants that the breach-of-contract issue had been decided by the trial justice.

We note that both parties on appeal challenged whether the trial justice decided the issue of a breach of contract in the Rule 54(b) judgment. On its face, defendants' right to appeal the Rule 54(b) judgment appears to be time-barred by the fact that no notice of appeal was filed within twenty days of the entry of judgment on December 15, 1989. Sup. Ct. R. 4; § 9-24-1. However, in *Pearson v. Old Stone Savings Bank*, 119 R.I. 836, 383 A.2d 1029 (1978), where a party appealed from a Rule 54(b) judgment that decided the issue of liability and injunctive relief but reserved determination of the damages issue, this court held that the Rule 54(b) judgment was not ripe for appeal because it was "neither final nor [did] it fall within the narrow exceptions which permit appeal from interlocutory decrees." *Pearson*, 119 R.I. at 838-39, 383 A.2d at 1030. The test of finality of a judgment for purposes of appeal is that "it should terminate all litigation arising out of the cause between the parties on the merits[,]" and "if the judgment were affirmed, the court below should have only to execute the decree it had previously entered." *Id.* at 839, 383 A.2d at 1030. In *Pearson*, this court opined that because the Superior Court had reserved jurisdiction to determine the damages issue, it would have to undertake more than execution of its

decree were this court to affirm the denial of the injunction. *Id.*

At the time the Superior Court entered the Rule 54 (b) judgment in the instant case, "all issues of liability relating to counts II, III, IV and V of the Verified First Amended Complaint and all issues of damages relating to all Counts" were reserved for determination by a jury at a later date. Under *Pearson,* the breach-of-contract issue in this case was not final for purposes of appeal until all remaining issues of liability and damages were concluded.

Had the parties raised in this appeal the *merits* of the Superior Court's determination on the breach-of-contract issue, we would be constrained to conclude that the trial justice was correct in finding a breach of the contract for the sale of land by defendants. In light of the fact that the city, through its mayor, openly admitted that "legally binding agreements were entered into by the City and Jolicoeur Furniture to sell * * * land for the purpose of the construction of a new Jolicoeur Furniture Showroom and Warehouse[,]" we conclude that the trial justice was correct in finding that there was a binding legal contract between the city and plaintiffs. Finally, because land is "unique and distinctive," adequate compensation cannot be achieved through monetary damages, and an award of specific performance is an appropriate remedy in the breach of a contract for the sale of land. *Griffin v. Zapata,* 570 A.2d 659, 661-62 (R.I. 1990).

Accordingly, we hold that defendants consented to a waiver of a jury trial on the breach-of-contract issue and that the Rule 54(b) judgment properly determined that defendants breached a legally binding contract.

SECTION 1983 CLAIMS

On appeal, defendants argued that they were not subject to liability under 42 U.S.C. § 1983. " 'The very purpose of § 1983 was to interpose the * * * courts be-

tween the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial" '." *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 503, 102 S. Ct. 2557, 2561, 73 L. Ed. 2d 172, 179 (1982). In our consideration of whether Baldelli and Bouley violated plaintiffs' constitutional rights and thus would be subject to liability under 42 U.S.C. § 1983, "it is not necessary for us to decide any question concerning the immunity of state * * * officials as a matter of federal law because * * * 'the first inquiry in any § 1983 suit is * * * whether the plaintiff has been deprived of a right "secured by the Constitution and laws" of' the United States. The answer to that inquiry disposes of this case." *Martinez v. California*, 444 U.S. 277, 284, 100 S. Ct. 553, 558, 62 L. Ed. 2d 481, 488-89, *reh'g denied*, 445 U.S. 920, 100 S. Ct. 1285, 63 L. Ed. 2d 606 (1980). In other words, "[t]he first inquiry in any § 1983 suit * * * is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws' " of the United States. *Baker v. McCollan*, 443 U.S. 137, 140, 99 S. Ct. 2689, 2692, 61 L. Ed. 2d 433, 439 (1979). All other issues are secondary to this determination.

The plaintiffs have alleged that defendants had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. After reviewing plaintiffs' claims, we have concluded that plaintiffs have failed to demonstrate that any of these actions have in fact risen to a level of constitutional deprivation. In analyzing claims under 42 U.S.C. § 1983 and the appropriateness of attorneys' fee awards under the related statute 42 U.S.C. § 1988, other State Supreme Courts have held that certain Fourteenth Amendment constitutional claims were not actionable under 42 U.S.C. § 1983 because they involved private rather than public rights. *See* 1 Steven H. Steinglass, *Section 1983 Litigation in State Courts* § 2.5(b)(3)

(1992). In analyzing a 42 U.S.C. § 1983 condemnation claim and the associated denial of attorneys' fees under 42 U.S.C. § 1988, for example, the South Dakota Supreme Court stated:

> "As we review the cases indexed under section 1988, the rights being enforced are rights subject to 42 U.S.C. § 1983 actions, such as voting rights, jury discrimination, school desegregations and equal protection. * * * We do not view the appellees' claims as analogous claims. They are not taken to vindicate a broad public interest. Rather, they are taken to enforce a private property right. Counsel are not private attorney generals, but act as private counsel seeking substantial monetary damages for their clients' injuries * * *. *Were we not to take such a view, every artful counsel could dress up his dog bite case as within sections 1983 and 1988.*" (Emphasis added.) *Boland v. City of Rapid City*, 315 N.W.2d 496, 503 (S.D. 1982).

See also Welsh v. City of Orono, 355 N.W.2d 117, 124 (Minn. 1984) (private nature of plaintiff's claim not "a fundamental civil rights issue," citing *Boland*); *Van Emmerik v. Montana Dakota Utilities Co.*, 332 N.W.2d 279, 284 (S.D.), *cert. denied*, 464 U.S. 915, 104 S. Ct. 278, 78 L. Ed. 2d 257 (1983) (private property rights not within purview of 42 U.S.C. § 1988 awards of attorneys' fees).

In the case before us, the right claimed by plaintiffs does not affect a fundamental civil right "such as voting rights, jury or job discrimination, school desegregation, or the like." *Welsh*, 355 N.W.2d at 124 (award of attorneys' fees under 42 U.S.C. § 1988). "[N]or is plaintiff the member of a distinct, oppressed minority group. No injunctions were sought to stop illegal police practices, nor was the public interest vindicated in any way other than in the indirect manner of most common law * * * cases." *Boland*, 315 N.W.2d at 503 (quoting

Martin v. Hancock, 466 F. Supp. 454, 456 (D. Minn. 1979)). The plaintiffs have merely stated private claims that address no public right or interest and that are actionable and compensable under state law. We therefore hold as a matter of law that defendants did not take plaintiffs' property in violation of "the Constitution and laws" of the United States. *Baker*, 443 U.S. at 140, 99 S. Ct. at 2692, 61 L. Ed. 2d at 439.

The plaintiffs next asserted that they were deprived of their property rights without substantive due process. The plaintiffs are, of course, unable to claim a violation of procedural due process because, as noted above, an adequate postdeprivation remedy exists in the form of a common-law action. *See Parratt v. Taylor*, 451 U.S. 527, 539, 101 S. Ct. 1908, 1915, 68 L. Ed. 2d 420, 431 (1981).[1]

Substantive due process, as opposed to procedural due process, addresses the "essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government's conduct, regardless of procedural swaddling, was in itself impermissible." *Amsden v. Moran*, 904 F.2d 748, 753 (1st Cir. 1990). In *Amsden* the First Circuit noted that the standard purports to protect individuals against state actions that are " 'arbitrary and capricious' " or that run counter to " 'ordered liberty' " or that are " 'shocking or violative of universal standards of decency' " or even " 'to close to the rack and the screw'." *Id.* at 753-54.

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[1] *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), held that because states could not often provide a meaningful predeprivation process in situations wherein the plaintiff has suffered a loss of property as a result of a "random and unauthorized" act by a state employee, a meaningful postdeprivation hearing satisfied the requirements of the Fourteenth Amendment. *Id.* at 541, 101 S. Ct. at 1916, 68 L. Ed. 2d at 432. Because we hold today that defendants are liable to plaintiffs under state common law, the procedural requirements of the Due Process Clause are therefore satisfied.

See also Tenoco Oil Co. v. Department of Consumer Affairs, 876 F.2d 1013, 1021 (1st Cir. 1989) (noting a regulation that takes property violates the clause if it is arbitrary, discriminatory, or irrelevant to a legislative policy). The First Circuit concluded that, however phrased, "the constitutional line has been crossed" only when some basic and fundamental principle has been transgressed. *Amsden*, 904 F.2d at 754 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S. Ct. 462, 38 L. Ed. 2d 324 (1973)).

We are of the opinion that, in this case, the constitutional line has not been crossed. "That one of the parties to the controversy is a governmental unit does not automatically convert a common law * * * action to a section 1983 claim." *Lillehaug v. City of Sioux Falls*, 788 F.2d 1349, 1352 (8th Cir. 1986). Whatever the deficiencies in defendants' behavior, neither the city nor Baldelli nor Bouley acted in a manner that was in and of itself "egregiously unacceptable, outrageous, or conscience-shocking." *Amsden*, 904, F.2d at 754. Indeed, defendant city of Woonsocket clearly accommodated plaintiffs over a long period, attempting almost to the end to assist plaintiffs in reaching an acceptable solution to both parties' dilemmas. The city's activities could hardly be classified as "conscience-shocking," given its renewal of the deadline, the holding of a council "workshop," and repeated accommodations to plaintiffs' lack of activity concerning submission of the building plans.

As for Baldelli and Bouley, DEM's threat and insinuation concerning Woonsocket's continued receipt of state funds placed those officials in an untenable and unenviable position, one that was probably exacerbated by plaintiffs' inactivity. Placed between the Scylla of loss of state funds and the Charybdis of violating the agreement with plaintiffs,

that defendants fell into their course of action is not incomprehensible. We have considered plaintiffs' claim that defendants impaired their contractual obligations to plaintiff in violation of Art. 1, sec. 10, of the United States Constitution and conclude that it is without merit. We therefore hold that as a matter of law, defendants did not violate plaintiffs' right to substantive due process. Because plaintiffs have failed to demonstrate the threshold requirements of a 42 U.S.C. § 1983 claim, we hold as a matter of law that plaintiffs are not entitled to recover under 42 U.S.C. § 1983. *Trembley v. City of Central Falls,* 480 A.2d 1359, 1366-67 (R.I. 1984). Consequently we vacate the award of attorneys' fees and the award of punitive damages against Baldelli and Bouley. Thus, the arguments on cross-appeal on the award of attorneys' fees and on the award of punitive damages are rendered moot. Because we have determined that plaintiffs' 42 U.S.C. § 1983 claim is invalid, we need not address defendants' purported immunity to such claims or defendants' charge that plaintiffs failed to prove that defendants' acts constituted a final official policy in accordance with *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S. Ct. 1292, 89 L.Ed. 2d 452 (1986).

TORTIOUS INTERFERENCE WITH CONTRACT

The defendants Baldelli and Bouley also asserted that the trial justice erroneously denied their moton for directed verdict in regard to plaintiffs' claim that they had tortiously interfered with plaintiffs' contract. After plaintiffs had rested, defendants moved for a directed verdict, arguing that there had been no third-party interference with the contract. The trial justice denied the motion. Again, after both sides had rested, defendants moved for a directed verdict, arguing once more that there had been no third-party interference with the contract between the city of Woonsocket and plaintiffs because Baldelli and Bouley were not third parties and had not acted outside the

scope of their authority. Again the trial justice denied the motion.

The standard for granting a directed verdict under Rule 50 of the Superior Court Rules of Civil Procedure is well established in our case law. In reviewing the denial of a motion for a directed verdict, this court views all evidence in a light most favorable to the adverse party, draws all reasonable inferences from this evidence in a light most favorable to the adverse party, and refrains from weighing the evidence and passing on the credibility of witnesses. *Palmisciano v. Burrillville Racing Association*, 603 A.2d 317, 320 (R.I. 1992). If there exist some issues upon which reasonable persons might draw conflicting conclusions, a motion for a directed verdict should be denied. *Id.*

In the instant case, the trial justice determined that reasonable minds could differ over the question of whether defendants Baldelli and Bouley tortiously interfered with the contract that existed between plaintiffs and the city of Woonsocket. The basic elements of a claim based on a tortious interference with a contractual relationship are "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his intentional interference; and (4) damages resulting therefrom." *Smith Development Corp. v. Bilow Enterprises, Inc.*, 112 R.I. 203, 211, 308 A.2d 477, 482 (1973).

The elements of the tort have been established in this case. As explained *supra*, a legally binding contract existed between plaintiffs and defendant city of Woonsocket. In addition, the mayor admitted that "legally binding agreements were entered into by the City and Jolicoeur Furniture[,]" evidencing a knowledge of the contract on the part of Baldelli. Bouley's letter of August 20, 1987, also demonstrates knowledge of an existing contractual relationship between plaintiffs and the city in its reference to "the purchase of * * * land * * * previously agreed to." Next, Baldelli intentionally interfered with the contract by

vetoing the November 16, 1987 amendment, thus nullifying the city council's extension of the deadline until December 31, 1987. Bouley intentionally interfered with the contract by refusing to consider plaintiffs' plans in December 1987. Lastly, plaintiffs suffered damages from this interference, discussed *infra*. Thus, the elements of the intentional tort of interference with contract were demonstrated by plaintiffs.

In their motions for directed verdict and again on appeal, however, defendants argued that Baldelli and Bouley —the mayor and the planning director, respectively, of the city of Woonsocket—could not be liable for a contract in which the city was a party.

"It is usually said that tort liability may be imposed upon a defendant who intentionally and improperly interferes with the plaintiff's rights under a contract with *another person* if the interference causes the plaintiff to lose a right under the contract or makes the contract rights more costly or less valuable." (Emphasis added.) W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 129 at 978 (5th ed. 1984). The question, therefore, is whether Baldelli, Bouley, and the city of Woonsocket can be considered the same party.

The city of Woonsocket's Home Rule Charter chapter 1, section 10, vests the legislative powers of the city in the city council. Chapter 4, section 2, however, directs that the mayor "shall be the chief *executive* and administrative officer of the city and shall be responsible for the administration and management of all *offices, departments, and agencies.*" (Emphasis added.) Because these provisions have established separate branches of the city government, it is not inconceivable that the separate branches would be independent enough to act in opposition to one another in any number of ways. *See generally Goldwater v. Carter*, 444 U.S. 996, 997-98, 100 S. Ct. 533, 534, 62 L. Ed. 2d 428, 428 (1979) (suit by mem-

bers of Congress against President); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (same). Additionally, numerous cases in the private sector have addressed the ability of an agent to interfere with the contract of the principal. *See* Thomas G. Fischer, Annotation, *Liability of Corporate Director, Officer, or Employee for Tortious Interference with Corporation's Contract with Another*, 72 A.L.R. 4th 492 (1989).

In *Roy v. Woonsocket Institution for Savings*, 525 A.2d 915 (R.I. 1987), we considered a claim by a dismissed employee that his immediate superior had tortiously interfered with the employee's contractual relationship with his employer. *Id.* at 916-17. In that case we noted that in maintaining the cause of action, "[m]alice, in the sense of spite or ill will, is not required; rather legal malice—an intent to do harm without justification—will suffice." *Id.* at 919 (quoting *Mesolella v. City of Providence*, 508 A.2d 661, 669-70 (R. I. 1986)).

Other state courts have addressed this issue as well. Illinois, for example, has recognized that a corporate officer may be held liable under a tort theory for unjustified interference with his or her corporation's own contract. *Swager v. Couri*, 77 Ill.2d 173, 190, 395 N.E.2d 921, 927 (1979).

In the instant case, ample evidence demonstrated that Baldelli and Bouley intentionally interfered with the contract between the city and plaintiffs. "If [the] interference is found to be intentional and without justification, it is malicious in law even though it arose from good motives and without express malice." *Steranko v. Inforex, Inc.*, 5 Mass. App. Ct. 253, 273, 362 N.E.2d 222, 235 (1977), adopted by the Supreme Judicial Court of Massachusetts in *Gram v. Liberty Mutual Insurance Co.*, 384 Mass. 659, 429 N.E.2d 21 (1981). Although defendants here may have had good motives because of the potential loss of state funds to the city, they were not legally justified in

their attempt to obstruct the successful completion of the contract between the city and plaintiffs. A legally binding contract existed between the city and plaintiffs, and Baldelli and Bouley acted tortiously to frustrate this agreement. Because their actions were not justified and constituted legal malice toward plaintiffs, their conditional privilege to act as agents of the city was destroyed. *See Lorenz v. Dreske*, 62 Wis.2d 273, 287, 214 N.W.2d 753, 760 (1974). Consequently, we find that the trial justice properly denied the motion of defendants Baldelli and Bouley for a directed verdict on the basis of abundant evidence upon which reasonable jurors could conclude that defendants acted with malice toward plaintiffs.

THE JURY INSTRUCTIONS

The defendants also claimed on appeal that the instructions read by the trial justice to the jury were confusing to the panel, prejudicial to defendants, and erroneous in stating the law. The defendants argued that the instruction on tortious interference with contract did not reflect the correct standard, that the 42 U.S.C. § 1983 instruction was cryptic, that the punitive-damages instruction was biased, that the instruction on lost profits erroneously directed the jury to find them, and finally, that a cautionary instruction should have been given concerning a piece of evidence introduced at trial.

Because we have concluded that there were no deprivations of constitutional rights, the claims in regard to punitive damages and 42 U.S.C. § 1983 are moot. In regard to the other instructions, it is "axiomatic that the trial justice [is] obliged to instruct the jury with precision and clarity with respect to the rules of law applicable to the issues raised at trial." *Armstrong v. Polaski*, 117 R.I. 565, 568, 369 A.2d 249, 251 (1977). Our review of the record has persuaded us that the trial justice's instructions conformed to the standard. The facts and the legal

issues in this case were complex. The jury instructions, therefore, by necessity reflected this reality. The trial justice's instructions demonstrated sufficient "precision and clarity," and, consequently, defendants' appeal on this issue is denied.

REDUCTION OF COMPENSATORY DAMAGES AWARDED BY JURY

On cross-appeal, plaintiffs argued that the trial justice erred by subtracting $28,540 (the increased construction costs claimed by plaintiffs) from the jury's compensatory damage award of $340,000 and by conditioning plaintiffs' recovery of the $28,540 on their starting and completing the construction of a new furniture store by certain dates.

At trial, plaintiffs submitted a summary of damages that listed seven items totaling $391,331, but the jury awarded plaintiffs only $340,000 in compensatory damages against all defendants. After trial, in response to defendants' motion to alter or amend the judgment, the trial justice amended the verdict by denying defendants' request for a remittitur but granting defendants' request to place conditions on plaintiffs' recovery of $28,540 in putative increased construction costs.

Public interest requires that jury verdicts possess a conclusiveness that will preserve the finality of the jury trial as an instrument for doing substantial justice. *Newport Fisherman's Supply Co. v. Derecktor*, 569 A.2d 1051, 1053 (R.I. 1990) (quoting *Roberts v. Kettelle*, 116 R.I. 283, 300, 356 A.2d 207, 217 (1976)). For the same reason, judgments are "presumed to have been made up after careful deliberation" and are not to be disturbed without substantial reason. *Chase v. Almardon Mills, Inc.*, 102 R.I. 579, 581, 232 A.2d 390, 391-92 (1967) (quoting *Kolker v. Gorn*, 202 Md. 322, 325, 96 A.2d 475, 477 (1953)). We hold that if a trial justice cannot ascertain whether a particular item of dam-

ages was included in the jury verdict, the justice may not alter or amend the verdict by removing that item. *See Walker v. St. Laurent*, 103 R.I. 636, 639, 240 A.2d 414, 415 (1968) (in order to alter a confused, ambiguous, and inconsistent verdict, a trial justice must be able to say with certainty what the jury meant).

In this case, the jury award of compensatory damages in the amount of $340,000 was not itemized to reflect its component parts, nor was the jury questioned regarding its subtraction of $51,331 from the amount that plaintiffs claimed as damages. Although it is clear that the jury discounted that amount from the itemized list of damages submitted by plaintiffs, neither the trial justice nor this court can ascertain from the verdict which item or items the jury discounted. In the trial justice's opinion, five of the seven items listed by plaintiffs seemed "clear and concise" and the "only approximate items are the lost income and increased construction costs." Although the trial justice acknowledged the uncertainty over which item(s) the jury discounted by commenting that "[s]omewhere along the line they [the jurors] knocked off $50,000[,]" he proceeded to conclude that "[i]n the Court's opinion, the only area [the jurors] could knock it off is the lost income and profit."

Even if we accept the trial justice's statement that five of the seven items were "clear and concise," there still remained the two "approximate items" of lost income and increased construction costs. Although the trial justice concluded that "the only area [the jurors] could knock it off is the lost income and profit[,]" nothing in the verdict suggests that the $51,331 was discounted from lost income rather than from increased construction costs. Because the trial justice's assumption that the jury award included increased construction costs was not discernable from the verdict, his decision to deduct the increased construction costs must be reversed. *Accord Krock v. Chroust*, 330 Pa. Super. 108, 112-15, 478 A.2d 1376,

1378-80 (1984) (where it was impossible to ascertain from the general verdict whether damages were awarded to compensate work loss or the decedent's pain and suffering, it was improper for the trial justice to mold the verdict by deducting the work-loss benefits).

The trial justice could permissibly have conditionally corrected or modified the jury award by ordering a remittitur if the justice had concluded that the award was unreasonable in light of the evidence presented at trial. *Reccko v. Criss Cadillac Co.*, 610 A.2d 542, 545-46 (R.I. 1992); *Cotrona v. Johnson & Wales College*, 501 A.2d 728, 733 (R.I. 1985). A trial justice may not, however, reduce a jury award *without* using a remittitur. The trial justice in this case denied defendants' request for a remittitur, then impermissibly proceeded to reduce the jury award. Accordingly, we vacate items 1 and 2 of the amended final judgment and reinstate the original jury award of $340,000.

PREJUDGMENT INTEREST

The defendants argued that because no express statutory provision permits recovery of interest against municipalities, the trial justice erred when he imposed prejudgment interest on the award of damages. We disagree.

General Laws 1956 (1985 Reenactment) § 9-21-10 provides for an award of interest "[i]n any civil action in which a verdict is rendered * * * for pecuniary damages * * * at the rate of twelve percent (12%) per annum thereon from the date the cause of action accrued." In *Aiello Construction, Inc. v. Nationwide Tractor Trailer Training and Placement Corp.*, 122 R.I. 861, 868-69, 413 A.2d 85, 89 (1980), this court held that § 9-21-10 applied to judgments in breach-of-contract actions and we have consistently ruled that plaintiffs may recover interest in breach-of-contract cases. *See Joni Auto Rentals, Inc. v. Weir Auto Sales, Inc.*, 491 A.2d 328, 329-30 (R.I.

1985) (affirmed trial justice's award of interest under § 9-21-10 in a breach-of-contract claim); *North Smithfield Teachers Association v. North Smithfield School Committee,* 461 A.2d 930, 934 (R.I. 1983) (trial justice erred in failing to award interest in accordance with § 9-21-10 in a breach-of-contract case).

The defendants contended on appeal that the recovery of interest is not available because defendant city is a municipality. The cases relied upon by defendants for this proposition pertain exclusively to tort claims. We note that tort claims against the state and municipalities are governed by the Governmental Tort Liability Act, G.L. 1956 (1985 Reenactment) chapter 31 of title 9, which specifically limits the amount of damages plaintiffs may recover in a *tort* action against the state, a city, or a town. Although plaintiffs in tort actions against the state or municipalities may need special legislative authority to recover interest on their judgments, *see, e.g. Cardi Corp. v. State,* 561 A.2d 384 (R.I. 1989), we are of the opinion that plaintiffs in this case are entitled to recover interest in accordance with § 9-21-10.

We disagree, however, with the date from which interest should be calculated. The trial justice imposed interest from August 25, 1987, the deadline established by the city's amendment to ordinance 4500. The plaintiffs, however, did not comply with the conditions specified in the contract until a date in the second half of 1989. We have concluded that interest should be awarded from that date of compliance in 1989 to the date of this opinion.

In summary, we conclude that the defendants were not denied their right to a jury trial on the breach-of-contract issue and that the Rule 54(b) judgment properly determined by its award of specific performance that the defendants breached a legally binding contract. The defendants, however, did not infringe upon the plaintiffs' constitutional rights, and therefore, the awards of attorneys' fees and punitive damages are vacated. Because the de-

fendants breached the contract and because Baldelli and Bouley tortiously interfered with plaintiffs' contract with the city of Woonsocket, damages in accordance with the jury award to the plaintiffs are granted in the amount of $340,000 in compensatory damages, plus interest from the date in late 1989 to be determined by the Superior Court on which plaintiffs fully complied with the terms of the contract until and including the date of this opinion. In regard to compensatory damages, the defendants are severally liable; we make no attempt to apportion damages but leave such a determination to the plaintiffs, who may seek the judgment from any or all defendants. The papers in the case may be remanded to the Superior Court for further proceedings in accordance with this opinion.

APPENDIX B

SUPERIOR COURT
STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.

AC 87-5690

JOLICOEUR FURNITURE

vs.

BALDELLI, *et al.*

HEARD BEFORE JUSTICE RONALD GAGNON

[1] July 31, 1989

(AFTERNOON SESSION)

(IN CHAMBERS)

THE COURT: Jolicoeur Furniture vs. Baldelli. 87-5690. Sometime prior to October of 1985, the real estate owned by the plaintiff, Jolicoeur Furniture Company was condemned for purposes of enlargement of the Bernon Street Bridge. The other plaintiff, James Zagrodny, under appropriate power of attorney has been acting upon behalf of the owner of Jolicoeur Furniture Company. As a result of the condemnation, Mr. Zagrodny, acting for the plaintiff, contacted the City of Woonsocket and its appropriate officials in an attempt to find suitable land for a replacement location. After the various negotiations and conversations with people within the City, property on Bernon Street designated as lot 155 and a

portion of lot 291, assessor's plat 14 seemed to be a suitable location as agreed by all the parties and an appropriate ordinance was enacted by the City of Woonsocket and signed by then Mayor Ayotte in October of 1985. That ordinance was slightly modified. The original ordinance provided for an $8,300 purchase price for lot 155 and a $5,600 purchase price for the portion of lot 291. That was modified to $11,000 for lot 155. One of the conditions of the ordinance was [2] that the parcels be sold as a singular package, meaning, I think, that both be sold to one individual, since lot 154 lies between the two. There was a condition pertaining to the submittal and approval of all plans by the Department of Planning and Development and the obtaining of all permits required to implement the proposal. The parcels are also sold subject to any and all liens, easements, restrictions, reservations and rights of way. This is exemplified in Plaintiff's Exhibits four A and B. Mr. Zagrodny accepted this as exhibited by Exhibit Number five, subject to condition that the lot 155 be restored to its original condition, that is the condition prior to construction of the Bernon Street Bridge. It was anticipated by Mr. Zagrodny in putting in that condition that the land would be ready and available for construction. It might be noted that the easement—there was an easement at that time over lot 155—was it 155 or 291?

MR. DESISTO: I thought it was 155.

MR. CARMAN: 155.

THE COURT: Well, there was an easement over one of the lots for the State of Rhode Island, for the purpose of storing equipment and material during the construction of Bernon Street Bridge, the easement was extended on several occasions, finally expiring August [3] 1, 1988. The record is replete with correspondence between members of the Planning Board, the Planning Director, State of Rhode Island, and in terms of the unfeasibility of having that location utilized as its furniture store and warehouse. But for the Court's view point, all of that is some-

what ancillary. It only indicates to the Court the travails of the litigation subsequent to that initial date of October 9, 1985, wherein the City and its officials suddenly realized they may have made a faux pas, and now trying to correct or protect their heals by using available legitimate ways to avoid the transaction. As I've indicated in conference with counsel, I'm not too sure that the Zagrodnys, or Mr. Zagrodny, on behalf of the plaintiffs, are that interested in re-establishing a new furniture business; but by the same token, I have no real evidence to indicate that, and it's purely speculative on my part. During the course of testimony and by various exhibits, Mr. Zagrodny indicated that he was willing to waive his condition on the easement; but again, I think much like the City, he was utilizing what he could at that moment to enhance his own position. The City, in trying to make good out of a bad deal, attempted during the period, an example see Exhibit 19 that the plans as exhibited to the Department of Planning contained three [4] or four items which would enhance their improvement of the Linear Park Development if that should occur and also making those conditions a prerequisite to approval, which is the building of the furniture store. Let me just say that there is a binding legal contract, in this Court's opinion between the City and Jolicoeur Furniture Company which is to be complied with within a reasonable time subject only to the submission of plans to the Department of Planning and Development. While it may be that the Department of Planning has no specific standards, certainly anything that would comport with the concept that the design submitted would be compatible with neighboring land uses would be acceptable, and from the Court's viewpoint, unless the City comes up with a very different point of view, the Department of Planning should have some say in the ultimate design and location of the building. I might point out that the City did not give any form of approval to the plans by signing the application for a variance before the Zoning Board. The only

function for the City at that point in signing is that any Zoning Board cannot hear any application, except by an owner or someone under an option, and all the City indicated at that point was that it was the owner had no objection to the application being submitted. The [5] Department of Planning, in reviewing the plans to be submitted by Mr. Zagrodny, are to totally disregard items three, five, six, seven, and ten on Exhibit 19 having to do with the Linear Park. It would be nice if it can be accomplished, but there is certainly no requirement or obligation on the part of the Zagrodnys to comply with that. I might point out also the Design Review Overlay District Regulation does not apply to Mr. Zagrodny. The ordinance was drafted in terms of uses within commercial District C one, two, and three or two, three, four; and those commercial uses in other Districts which were obtained by way of exception. Since Mr. Zagrodny's use of the locale is by way of variance, the clear language of the ordinance does not apply. As a parenthetical, it probably should apply, but that's only a question to be answered by the city officials who should have known the distinction, between a variance and exception and made some reference thereto. The plans submitted to the Zoning Board are not final in any sense of the word since the Zoning Board had no control or say of the plans except in general to give them an understanding of what the use of the premises are to be or whether or not they qualify for maximum use of the land, side lot variations or the like. The subsequent ordinances established by the city [6] council requiring sixty-day provisions for submission of plans are absolutely void and have no merit. You can't change the agreement after the fact to suit your purposes. Unfortunately, in the context in which this case appears now before the Court, the Court in a sense is now installing a somewhat similar concept, but that is necessary from the viewpoint of the parties that have been in litigation or in the process of pursuing litigation for almost four years; and there comes a time

when these matters have to come to an end. The easement has been removed so Mr. Zagrodny is presently capable of taking title. The Department of Planning has a limited criteria that we will not define to comply with local or city requirements of compatibility. Therefore, I will order the City of Woonsocket to convey the property in question to the plaintiff as soon as Mr. Zagrodny has provided an appropriate plan. I would require a report by October 10 and would anticipate that by October 31, the conveyance can take place. It is not my intention to be a super-Planning Board or a super-Zoning Board or the like. I would expect good faith on behalf of everyone, and I would anticipate that 90 days would be more than sufficient time for Mr. Zagrodny to comply with providing adequate plans for his building; and in turn, the City of Woonsocket to convey the property. [7] Any questions, gentlemen?

MR. DESISTO: Your Honor, just so the record is clear as to the 1983 claim—

THE COURT: I'm leaving that for the trial judge in the damage issue.

MR. DESISTO: Thank you.

MR. GROCHOWSKI: May I go off the record?

THE COURT: Off the record.

(Off the Record)

THE COURT: Just to clarify the Court's decision, the Court is of the opinion that there was a valid, binding contract between the parties that is still to be executed. There are conditions preceding that have to be complied with by Mr. Zagrodny, but if those conditions are met, then the City is under obligation to convey, and as I have indicated, I don't want to be a super-Planning Board, but if I don't have something concrete by October 10, then I will review the plans at that time and make a decision as to whether it complies.

(ADJOURNED)

APPENDIX C

SUPERIOR COURT
STATE OF RHODE ISLAND
PROVIDENCE, SC

C. A. No. 87-5690

JOLICOEUR FURNITURE CO., INC., and JAMES ZAGRODNY,
Plaintiffs,

v.

CHARLES C. BALDELLI, Individually and as Mayor of the City of Woonsocket; N. DAVID BOULEY, Individually and as Director of the Department of Planning and Development of the City of Woonsocket; ALBERT BRIEN, as Financial Director and Acting Treasurer of the City of Woonsocket; and THE CITY OF WOONSOCKET,
Defendants.

RULE 54(b) JUDGMENT

Pursuant to the Court's Order entered October 12, 1988, this action came on trial on certain issues of liability and specific performance (as requested in paragraphs b, c, d, g, h and i of plaintiffs' demand for judgment in the Verified First Amended Complaint) before the Court, Mr. Justice Gagnon presiding, and certain issues having been tried and a decision having been duly rendered on July 31, 1989, and there being no just reason for delay of entry of judgment, It is Ordered as follows:

(1) plaintiffs are awarded specific performance of the agreement to purchase Lot 155 and a portion of Lot 291 of Assessor's Plat 14 (the "Property"), and the City is directed to convey the Property to plaintiffs forthwith. In

addition, upon application of Jolicoeur Furniture, the City shall cause a building permit to be issued for the construction of a furniture store as shown in the revised design plans prepared by Seavor Associates, and no further approval of the Zoning Board, Planning Board, Planning Department, Design Review Board, or City Planner shall be required for the issuance of such a permit;

(2) the so-called 60-day deadline and other conditions imposed by defendants after the enactment of Ordinance Chapter 4500, including all conditions relating to the proposed park, are void;

(3) the so-called Design Overlay District ordinance does not apply and may not be applied to the Property;

(4) pursuant to Rule 54(b), the clerk is directed to enter this order as a final judgment as to claims and issues here adjudicated;

(5) all issues of liability relating to Counts II, III, IV and V of the Verified First Amended Complaint and all issues of damages relating to all Counts shall be tried before a jury on January 29, 1990, and that the Court's October 12, 1988 Order is hereby modified to the extent inconsistent with this Order.

Dated at Providence, Rhode Island, this 15th day of December, 1989.

PER ORDER:

/s/ Linda B. Parsons
Asst. Clerk of Court

ENTER:

/s/ Ronald R. Gagnon
Dated: 12-15-89

[SEAL]

APPENDIX D

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS
SUPERIOR COURT
PROVIDENCE/BRISTOL

Case No. PC 87-5690

JOLICOEUR FURNITURE

VS.

BALDELLI

JUSTICE GAGNON

Date 4-14-92

CIVIL CASE ACTION REPORT

Date 4-15-92

OTJ Case opens to jury and trial proceeds

4/16-4/24 Trial continues

4/21 Defs move for directed verdict as to each count and same is denied

4/23 Defs renew motion for directed verdict—Ct 1 denied Ct 2-4 reserved

Date 4-27-92

TRC Trial proceeds and concludes (OR)

OV/VER Judgment on Verdict Entered for the:

Jury returns verdict for the plf as follows:

Compensatory damages: $340,000 plus int.

Punitive damages:

As to N. David Bouley: $15,000 no int

As to Charles Baldelli: $15,000 no int

Court denies motion for directed verdict

[SEAL]

APPENDIX E

SUPERIOR COURT
STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS
PROVIDENCE/BRISTOL

Case No. PC 87-5690

CIVIL JUDGMENT ON VERDICT

This action came before the court for a trial by jury, Justice Gagnon presiding, and the issues having been duly tried by jury and the jury having duly rendered its verdict; It Is Ordered and Adjudged That After Trial on the primary claim the plaintiff Jolicoeur Furniture Co. et al. recover of the defendant Charles Baldelli the sum of $15,000 with no interest thereon.

Dated at Providence, Rhode Island, this 27th day of April, 1992.

/s/ Jean Herard
Asst. Clerk

[SEAL]

APPENDIX F

SUPERIOR COURT
STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS
PROVIDENCE/BRISTOL

Case No. PC 87-5690

CIVIL JUDGMENT ON VERDICT

This action came before the court for a trial by jury, Justice Gagnon presiding, and the issues having been duly tried by jury and the jury having duly rendered its verdict; Is Is Ordered and Adjudged That After Trial on the primary claim the plaintiff Jolicoeur Furniture Co. et al. recover of defendant Charles Baldelli, et al. the sum of $340,000 with interest thereon at the rate of 12% (per annum) as provided by law $176,166.57 (interest amount) and costs of action for a total amount of $516,166,57.

Dated at Providence, Rhode Island, this 27th day of April, 1992.

/s/ Jean Herard
Asst. Clerk

APPENDIX G

[SEAL]

SUPERIOR COURT
STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS
PROVIDENCE/BRISTOL

Case No. PC87-5690

CIVIL JUDGMENT ON VERDICT

This action came before the court for a trial by jury, Justice Gagnon presiding, and the issues having been duly tried by jury and the jury having duly rendered its verdict;

IT IS ORDERED AND ADJUDGED THAT AFTER TRIAL on the primary claim: the plaintiff Jolicoeur Furniture Co., et al. recover of the defendant N. David Bouley the sum of $5,000 (Judgment Amount) with no interest thereon.

Dated at Providence, Rhode Island, this 27th day of April, 1992.

/s/ Jean Herard
Clerk

APPENDIX H

[SEAL]

SUPERIOR COURT
STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

Case No. PC87-5690

JOLICOEUR FURNITURE

VS.

CHARLES BALDELLI

7-1-92

JUDGE GAGNON

CIVIL CASE
CLERKS INFORMATION
REPORTING FORM

Heard on:

Def's motion for a new trial—denied

Plf's motion for attny's fees is granted. Plf's attny's are awarded $174,182.30 without interest.

As to damages awarded:

Punitive damages to remain as is.

Compensatory damages awarded in the amt of $340,000 to remain as is but with certain conditions.

ORDER TO ENTER

APPENDIX I

SUPERIOR COURT
STATE OF RHODE ISLAND
PROVIDENCE, S.C.

C. A. No. 87-5690

JOLICOEUR FURNITURE CO., INC.,
and JAMES ZAGRODNY,
Plaintiffs,

v.

CHARLES C. BALDELLI, Individually and as Mayor of the City of Woonsocket; N. DAVID BOULEY, individually and as director of of the Department of Planning and Development of the City of Woonsocket; ALBERT BRIEN, as Financial Director and Acting Treasurer of the City of Woonsocket; and THE CITY OF WOONSOCKET,
Defendants.

AMENDED FINAL JUDGMENT

This action came on for trial before the Court and a jury, Mr. Justice Gagnon presiding, and the issues having been duly tried, the jury having duly rendered its verdict, and the Court having ruled on the parties' post-trial motions,,

It is ordered and adjudged:

1. That plaintiffs recover of the defendants, the City of Woonsocket, Charles Baldelli, and N. David Bouley, the sum of $311,460.00, plus interest thereon at the rate of 12 percent per annum from August 25, 1987, through July 31, 1992 in the amount of $184,418.45, plus $102.40 per diem until judgment is entered;

2. That plaintiffs recover of the defendants, the City of Woonsocket, Charles Baldelli, and N. David Bouley increased construction costs in the amount of $28,540 with interest thereon at the rate of 12 percent from August 25, 1987 through July 1, 1993 in the amount of $20,042.12 (thereafter interest will be suspended), provided that plaintiffs begin construction of a new furniture store by July 1, 1993 and complete construction by April 1, 1994. If construction is not begun by July 1, 1993 or completed by April 1, 1994, the award as it pertains to the $28,540 and any interest thereon will be vacated. If plaintiffs begin and complete construction by the above dates, the sum of $28,540 plus interest at the rate of 12 percent from August 25, 1987 through July 1, 1993, will be paid over to plaintiffs.

3. That plaintiffs recover from defendant Charles Baldelli the sum of $15,000 as punitive damages.

4. That plaintiffs recover from defendant N. David Bouley the sum of $15,000 as punitive damages.

5. That plaintiffs recover of the defendants, the City of Woonsocket, Charles Baldelli and N. David Bouley, their attorneys fees and expenses in the sum of $174,182.30.

Dated at Providence, Rhode Island this 30th day of July, 1992.

By order:

/s/ Lucille A. Saso
Supervising Clerk of the Court

ENTER:

/s/ Ronald R. Gagnon, Jr.
7-30-92

APPENDIX J

SUPERIOR COURT
STATE OF RHODE ISLAND
PROVIDENCE, SC.

C.A. No: 87-5690

JOLICOEUR FURNITURE CO., INC.,
and JAMES ZAGRODNY,
Plaintiffs,

VS.

CITY OF WOONSOCKET, CHARLES C. BALDELLI, Individually and as Mayor of the City of Woonsocket, N. DAVID BOULEY, Individually and as director of the Department of Planning and Development of the City of Woonsocket; ALBERT BREIN, as Financial Director and Acting Treasurer of the City of Woonsocket; and THE CITY OF WOONSOCKET,
Defendants.

AMENDED FINAL JUDGMENT

This action came on before the Court on remand from the Supreme Court for further proceedings in accordance with an Opinion of the Supreme Court dated February 6, 1995, and with the agreement of counsel for the parties, it is hereby:

ORDERED AND ADJUDGED

1. That plaintiffs shall recover of the defendants the amount of $340,000 in compensatory damages, plus prejudgment interest thereon at the rate of twelve percent (12%) per annum calculated from December 15, 1989, the date on which plaintiffs fully complied with the terms

of the contract with the defendant City, to the date this judgment is entered, as set forth below.

2. That when the compensatory damages award of $340,000 is added to the amount of prejudgment interest calculated at twelve percent (12%) per annum from December 15, 1989 through May 15, 1995 ($340,000 × 65% = $221,000), the total amount is $561,000.

3. That the per diem amount of interest to be added to the judgment of $340,000 at twelve percent (12%) per annum is $111.78 per diem ($340,000 × 12% = $40,800 ÷ 365 = $111.78).

4. That, based on the above calculations, plaintiffs shall recover judgment from defendants (or any one or more of them) the total sum of $561,000 plus $111.78 per diem from May 15, 1995 until the date this judgment is entered. Thereafter, post-judgment interest shall accrue on the total amount of the judgment ($340,000 plus pre-judgment interest to the date this judgment is entered) at the rate of twelve percent (12%) per annum until the judgment is satisfied.

By Order,

/s/ Anne M. Collins

ENTER:

/s/ Ronald R. Gagnon
J.

Dated: June —, 1995

SUPREME COURT

No. 93-143-A

JOLICOEUR FURNITURE CO. and
JAMES ZAGRODNY

v.

CITY OF WOONSOCKET, *et al.*

ORDER

The motion of defendants for an extension of the time within which to file their petition for reargument and their response to the plaintiffs' petition for reargument, as prayed, is granted. The petitions for reargument filed by the parties, respectively, in this appeal are denied.

Entered as an Order of this Court this 27th day of April 1995.

By Order,

/s/ Illegible
BRIAN B. BURNS
Clerk Pro Tempore

Supreme Court, U.S.
FILED
OCT 6 1995
OFFICE OF THE CLERK

No. 95-193

In The

Supreme Court of the United States

October Term, 1995

JOLICOEUR FURNITURE COMPANY, INC., et al.,

Petitioners,

v.

CHARLES C. BALDELLI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Rhode Island Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On January 21, 1986, the Woonsocket, Rhode Island, city council passed an ordinance authorizing the contingent sale of two city-owned parcels of land to James Zagrodny. *Jolicoeur Furniture Co., Inc. v. Baldelli*, 653 A.2d 740, 744 (R.I. 1995); Appendix (A.)[1] 3. Zagrodny's interest in buying that land, as well as a third privately held lot, was engendered by the need to relocate the Jolicoeur Furniture Company. The former site had been taken by the state to build a bridge. *Jolicoeur*, 653 A.2d at 743; A. 2. The ordinance stated that "[t]he sale was conditioned on 'the submittance and approval of all plans by the Department of Planning & Development and the obtainment of all permits as required to implement the bidder's proposal.'" No buildable plans were submitted to the department until December 1987, the same month that Zagrodny sued the city, its mayor, and its planning director. *Jolicoeur*, 653 A.2d at 744; A. 3.

The intervening two-year period, between the passing of the ordinance and the filing of the suit, was a time of increasing frustration for Woonsocket city officials for two reasons: Zagrodny refused to move forward and two state administrative departments intervened. Initially, Zagrodny had demonstrated his earnest by submitting $1,500 to the city, but he also imposed his own conditions: 1) that he be able to purchase the privately owned property; and 2) that the city-owned lot, on which the state held an easement related to the bridge-building project,

---

[1] All citations to the appendix refer to appendix A to the petition for a writ of *certiorari*.

be restored to its original condition. The easement was scheduled to expire in the spring of 1986 but the state department of transportation extended its time period. Then, the state department of environmental management informed the mayor that it had identified the land in issue for a park. *Jolicoeur*, 653 A.2d at 744; A. 4-5. Not only did the impending sale endanger the funding of that specific project, but the state indicated that, if the sale went through, Woonsocket would not receive future funding for like purposes. *Jolicoeur*, 635 A.2d 744-745; A. 5.

In the meanwhile, Zagrodny had submitted no plans nor taken any steps toward obtaining the necessary permits. Therefore, the city council on June 1, 1987, a year and a half after original passage, amended the ordinance to provide a 60-day time frame within which Zagrodny must act. *Jolicoeur*, 653 A.2d at 745; A. 5. Although some meetings were then held among city officials, Zagrodny, and his architect, the deadline came and went with little discernable progress. *Jolicoeur*, 653 A.2d at 745; A. 6. At that point the city council stepped into the fray. It held a workshop on the matter and suggested that Zagrodny submit his "plans" to the zoning board. That body approved a variance for the land. Subsequently, on November 16, 1987, the city council once again amended the ordinance to extend Zagrodny's deadline for submission of acceptable plans to December 31. *Jolicoeur*, 653 A.2d at 745; A. 7.

The mayor vetoed this second amendment on the grounds that, because of his dilatoriness, the city had no further obligation to Zagrodny. *Jolicoeur*, 653 A.2d at 746; A. 7. The council failed to override the veto on December

9, 1987. In an uncharacteristic burst of activity, in the next two weeks Zagrodny hired a lawyer, tendered full but rejected payment to the city financial director, attempted to submit plans to the planning director, and then filed suit on Christmas Eve. *Jolicoeur*, 653 A.2d at 746; A. 7-8.

A bifurcated trial was held in the superior court where, in July 1989, a justice of that court determined the liability and specific performance issues in favor of Zagrodny and Jolicoeur Furniture, leaving the damages to be tried to a jury. The award of specific performance was granted "subject only to the submission of plans to the Department of Planning and Development." *Jolicoeur*, 653 A.2d at 746; A. 8 (quoting the trial justice). By December 1989 Zagrodny had submitted acceptable plans and the city sold the real estate to him. *Jolicoeur*, 653 A.2d at 746; A. 8. In April 1992, a jury awarded $340,000 in compensatory damages based on various theories, including a claim brought pursuant to 42 U.S.C. § 1983,[2] and also awarded punitive damages against Woonsocket's, by then former, mayor and planning director. The defendants appealed and the plaintiffs cross-appealed. *Jolicoeur*, 653 A.2d at 747; A. 10.

The Rhode Island Supreme Court made various findings to resolve the many issues raised by the parties. The

---

[2] The jury awarded $340,000 compensatory damages: they did not separate the damages due to breach of contract, tortious interference with contract, and the § 1983 claims. Thus, even though the Rhode Island Supreme Court determined that Zagrodny was not entitled to recover under § 1983, his compensatory damage award was unchanged.

state law claims and the compensatory monetary judgment with interest were sustained in Zagrodny's favor, ultimately resulting in a payment to him of $565,721.24. The court rejected the claims brought under § 1983 including the punitive damages awarded against the individual defendants. Pertinent to the questions raised in the petition, the court applied a "shocks the conscience" test to determine that there was no substantive due process violation. Additionally, the court concluded that the Fifth Amendment takings claim was insufficient to trigger the protections of 42 U.S.C. § 1983.

SUMMARY OF ARGUMENT

Respondents respectfully urge that the petition for a writ of *certiorari* be denied. There are two issues raised by the petition which, neither individually nor together, are sufficiently compelling for the Court's attention. First petitioners assert that there is a split among the circuits over the correct standard to be applied on reviewing a substantive due process claim. To the contrary, this Court has recently reiterated that the applicable standard is "conscience-shocking." That is the standard applied by the Rhode Island Supreme Court. It is also the standard applied by the circuit courts of appeals.

The second point with which petitioners take issue is the Rhode Island Supreme Court's holding that, as a matter of law, there was no sustainable 42 U.S.C. § 1983 claim. Petitioners were not able to show a violation of the Fifth Amendment Takings Clause upon which they based

the § 1983 action. The Rhode Island Supreme Court committed no error worthy of this Court's review.

REASONS FOR DENYING THE PETITION

I. The Rhode Island Supreme Court applied the customary standard on review of substantive due process claims.

The Rhode Island Supreme Court found "that plaintiffs have failed to demonstrate that any of these actions have in fact risen to a level of constitutional deprivation." *Jolicoeur*, 653 A.2d at 750; A. 16. The court reviewed the defendants' actions following the standard set forth in *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991). While the *Amsden* standard is strict, it follows the dictates set forth by this Court for review of allegations of substantive due process violations.

A. This Court has established the relevant standard.

The "shocks the conscience" standard for determining whether there has been a violation of substantive due process was first used by this Court in *Rochin v. California*, 342 U.S. 165, 172 (1952). Other characterizations of the facts in that case were "too close to the rack and the screw" and "offen[sive] to a sense of justice." 342 U.S. at

172-73 (internal quotes omitted). Justice Frankfurter observed:

> The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

342 U.S. at 172 (citation omitted). Forty years later the faculties of the clause are still indefinite and vague; the Court has shown little disposition to set firmer outlines to its contours. That is not to say, however, that there have been no beacons along the way.

In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), respondent claimed that he had a property right to continue his education in a specific program where he had failed to pass a key examination. 474 U.S. at 217. Reviewing whether the court of appeals had correctly applied the substantive due process doctrine, the Court framed the question as "whether the record compels the conclusion that the University acted *arbitrarily* in dropping Ewing from the Interflex program without permitting a reexamination." 474 U.S. at 225 (emphasis added). Although the university regularly allowed students to re-take the test, the Court found that Ewing's dismissal from the program was "not beyond the pale of reasoned academic decision-making." 474 U.S. at 228-29. Thus, another expression of the standard was added to

"shocks the conscience" as determinative of a substantive due process claim: "arbitrary."

Six weeks after the decision in *Ewing*, *Daniels v. Williams*, 474 U.S. 327 (1986), noted that: "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." 474 U.S. at 331 (original emphasis). Once again, the applicable standard was "arbitrariness." *Id.* The Court, however, was careful to point out that the Constitution does not supplant tort principles "in laying down rules of conduct to regulate liability for injuries that attend living together in society." 474 U.S. at 332. Rather, it protects large concerns.

Later in the same term, respondent in *Moran v. Burbine*, 475 U.S. 412 (1986), claimed a violation of his substantive due process rights when police gave false information to an attorney inquiring about Burbine's interrogation. Finding no transgression, the Court applied a "shocks the sensibilities of civilized society" test. 475 U.S. at 433-434. Had *Burbine* been the last case in the line, it would be possible to argue that the "shocks the conscience" test is reserved for police-conduct cases and that the "arbitrary" standard applies in other substantive due process contexts. However, the decision in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992), thwarts such compartmentalization.

In *Collins*, a wrongful death case, the plaintiff asserted that the city's failure to provide a safe workplace violated her husband's substantive due process rights. 503 U.S. at 126. In its analysis of the claim, the standard

articulated by the Court was "arbitrary, or conscience-shocking, in a constitutional sense." 503 U.S. at 128. Thus, the test has one standard but two articulations: "arbitrary in a constitutional sense" is the same as "shocks the conscience" and considerably more rigorous than ordinary "arbitrariness." Therefore, it is not essential that formulaic words be used as long as the standard is strict. Although the *Jolicoeur* court cited language from the First Circuit, *Collins* validates the stringent standard applied there. The standard applied by the Rhode Island Supreme Court in *Jolicoeur* is the same as that enunciated in *Collins*.

B. There is no split between the circuit courts of appeals sufficient to merit this Court's attention.

Amsden v. Moran held that substantive due process protects from government conduct that is "egregiously unacceptable, outrageous, or conscience-shocking." Or, put another way: "In the substantive due process context, the requisite arbitrariness and caprice must be stunning, evidencing more than humdrum legal error." 904 F.2d at 754 n.5. Such characterization is strong stuff indeed and, at that time, the Third Circuit applied a much less rigorous test. *See, e.g., Neiderhiser v. Borough of Berwick*, 840 F.2d 213 (3rd Cir. 1988), *cert. denied*, 488 U.S. 822 (1988) (arbitrary or irrational); *Bello v. Walker*, 840 F.2d 1124 (3rd Cir. 1988), *cert. denied*, 488 U.S. 851 & 868 (1988) ("arbitrary, irrational or tainted by improper motive"). After the decision in *Collins* clarified the Court's requirements for successful invocation of substantive due process protection, the Third Circuit revisited the issue.

In *Fagan v. City of Vineland*, 22 F.3d 1296 (3rd Cir. 1994), the court sitting *en banc* determined that the decision in *Collins* required it to apply a "shocks the conscience" standard rather than the "reckless indifference" heretofore applicable in the Third Circuit. 22 F.3d at 1303.

> In light of the Supreme Court's unanimous adherence to the "shocks the conscience" test in *Collins*, the reckless indifference of government employees is an insufficient basis upon which to ground their liability for a police pursuit under the Due Process Clause. Such an inquiry is grounded in tort law, not in constitutional principles.

22 F.3d at 1306-07 (footnotes omitted). In deciding that its standard was inappropriate, the Third Circuit cited cases from seven other circuits, including the Second Circuit, which applied the "shocks the conscience" standard. 22 F.3d at 1303, 1305. In light of this marshalling of cases, any split among the circuits appears more illusory than real.

Even after *Fagan*, however, the Third Circuit does not necessarily articulate the standard as "shocks the conscience." Thus, in *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592 (3rd Cir. 1995), reviewing a grant of summary judgment for the defendants, the court said: "[A] property owner states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached." 53 F.3d at 593. That standard is certainly higher than the "reckless indifference" applied prior to *Fagan*. It is the "arbitrary in a constitutional sense" standard as enunciated in the alternative to "shocks the conscience" in *Collins*.

Fagan gathered the cases showing that there is not a split among the circuits. Different courts may articulate the substantive due process standard in different language but the terms are strict across the board. This Court mandated that strictness most recently in *Collins*. The Rhode Island court, following First Circuit precedent in determining the federal claims, also complied with the standard set by this Court. There is no significant split between the standard applied by the Rhode Island Supreme Court and those applied by the Circuit Courts of Appeals. There is, thus, no necessity for this Court to review the *Jolicoeur* decision.

C. The Rhode Island Supreme Court was correct in finding that there was no substantive due process violation.

The *Jolicoeur* court found that the defendants had not violated plaintiffs' substantive due process rights for two reasons. First, "[t]he city's activities could hardly be classified as 'conscience-shocking,' given its renewal of the deadline, the holding of a council 'workshop,' and repeated accommodations to plaintiffs' lack of activity concerning submission of the building plans." 653 A.2d at 751; A. 19. Thus, the court recognized that the plaintiffs bore some responsibility for the strained relations between the parties. Secondly, "[p]laced between the Scylla of loss of state funds and the Charybdis of violating the agreement with plaintiffs, that defendants fell into their course of action is not incomprehensible." *Id.* Therefore, the constitutional line was not crossed and the court held "as a matter of law that plaintiffs [were] not entitled to recover under 42 U.S.C. § 1983." *Id.*

Prior to taking up the merits of the claim, the *Collins* Court made an initial observation:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered [*sic*] area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

503 U.S. at 125. Moreover, "[t]here should be * * * great resistance to expand the substantive reach of [the Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental." *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986). Only six fundamental personal rights have been identified by the United States Supreme Court: the right to freedom of association, the right to vote and to participate in the electoral process, the right to interstate travel, the right to fairness in the criminal process, the right to procedural due process, and the right to privacy. 2 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.7 at 435-36 (2d ed. 1992). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, ___ U.S. ___, 114 S.Ct. 807, 812 (1994).

The Rhode Island court appropriately exercised judicial self-restraint in refusing to expand substantive due process protections as the *Jolicoeur* plaintiffs demanded. Only by identifying a new fundamental right, not yet

recognized by this Court, could the court have acceded to the contention that petitioners' 42 U.S.C. § 1983 claims were valid. Rather, the court properly applied this Court's conscience-shocking standard to deny that claim. Further, the court properly acknowledged that, simply because a defendant is a governmental unit, § 1983 is not automatically applicable. *Jolicoeur*, 653 A.2d at 751; A. 19. "[N]onexemplary governmental administrative actions do not automatically rise to the level of due process violations." *Silverman v. Barry*, 845 F.2d 1072, 1087 (D.C. Cir.), *reh'g en banc denied*, 851 F.2d 434 (D.C. Cir.), *cert. denied*, 488 U.S. 956 (1988). The Rhode Island Supreme Court correctly determined that there was no violation of substantive due process considering the facts of this case.

II. The Fifth Amendment takings claim did not trigger the protections provided by 42 U.S.C. § 1983.

The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use without just compensation. Petitioners sued respondents in the Rhode Island Superior Court, seeking damages for the delay – the "temporary taking" – resulting from the city's breach of the contract. After a trial the jury decided for petitioners and awarded them $340,000 as full compensation for that delay. Although the trial justice conditioned a portion of the award on actual construction on the land in question, the Rhode Island Supreme Court upheld the entire jury award on appeal. *Jolicoeur*, 653 A.2d at 754; A. 26. Furthermore, petitioners' right to

receive 12% statutory prejudgment interest[3] was also sustained on appeal. Thus, payment of $565,721.24 was made to petitioners as compensation for their damages.

> As we have explained, however, because the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 n.13 (1985) (original emphasis). "[A] property owner has not suffered a violation of the Just Compensation Clause until the owner has *unsuccessfully* attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation * * * ." *Williamson,* 473 U.S. at 195 (emphasis added). In this case, to the contrary, the petitioners successfully pursued their compensation claim. They prevailed in the superior court and that decision was sustained on appeal. They received full compensation. No property was taken without just compensation and, thus, no constitutional

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[3] Petitioners assert that the Rhode Island Supreme Court erroneously refused to countenance prejudgment interest for the period of time from the claimed date of breach in August 1987 until Zagrodny submitted plans in late 1989. However, the court specifically rejected that claim. It instead tied the interest to the date when Zagrodny finally complied with the conditions of the ordinance. In essence, then, petitioners wish to be paid interest for the delay period caused in no small part by their total inattention to their own business.

violation occurred. Therefore, there was no basis under the Takings Clause for a § 1983 action.

To successfully sustain a § 1983 claim, a plaintiff must prove that the underlying constitutional right was violated. *Daniels v. Williams*, 474 U.S. at 330. Here the underlying constitutional right is embodied in the Takings Clause. Where, as here, a regulatory taking is alleged:

> First, appellant must establish that the regulation has in substance "taken" his property – that is, that the regulation "goes too far." Second, appellant must demonstrate that any proffered compensation is not "just."

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986) (citations and footnote omitted).

Petitioners claim that the issue of whether they received their just compensation was presented to the Rhode Island Supreme Court which refused to reach it. Petition at 19. In fact:

> The plaintiffs cross-appealed * * * contending that the trial court erroneously reduced the jury's award of compensatory damages and abused its discretion when it failed to base its attorneys' fees award on current billing rates or, alternatively, failed to add prejudgment interest to an award based on historic billing rates.

Jolicoeur, 653 A.2d at 747; A. 10. The petitioners did not complain on appeal that the superior court proceedings failed to justly compensate them. Thus, their claim must rest on the proposition that the supreme court's adjustment of the interest period constitutes inadequate compensation. However, the supreme court tacitly reached

the just compensation question in making that adjustment by recognizing that petitioners' lack of compliance with the ordinance until 1989 was the source of a large part of the delay. The petition to this Court proclaims rather than demonstrates that they were unjustly compensated. Petitioners have not proven that the underlying constitutional right was violated as required by *MacDonald, Sommer & Frates*. Therefore, § 1983 protections are not available to them.

The Rhode Island Supreme Court held that petitioners were not entitled to recover under 42 U.S.C. § 1983 as a matter of law. *Jolicoeur*, 653 A.2d at 751; A. 20. That result was required under the settled law as enunciated by this Court. No further review of the proceedings in the state courts is necessary and the petition for writ of *certiorari* should be denied.

CONCLUSION

For all of the foregoing reasons, respondents respectfully urge that the petition for a writ of *certiorari* be denied.

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Petitioners,
v.
CITY OF WOONSOCKET, RHODE ISLAND,
CHARLES C. BALDELLI and N. DAVID BOULEY,
Respondents.

On Petition for a Writ of Certiorari to the Rhode Island Supreme Court

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

During the past four months, no fewer than four petitions for certiorari have been filed with his Court seeking clarification of the substantive due process standard applicable to arbitrary government action that deprives a citizen of the ownership or use of his land. *See Bensalem Township v. Blanche Road Corp.*, No. 95-249 (filed Aug. 11, 1995); *Zoning Board of Adjustment for the Township of West Amwell v. BeBlasio*, No. 95-163 (filed Aug. 26, 1995); *Freeman v. Town of West Baylston*, No. 95-195 (filed July 24, 1995). Each of these petitions identified the same conflict as petitioner Jolicoeur in the instant petition: the Third Circuit applies an "arbitrariness" test to decide substantive due process claims in the

land use context, while the Rhode Island Supreme Court and the First Circuit apply a stricter "shocks the conscience" test. The frequent recurrence of this issue demonstrates the need for plenary review. Indeed, the Attorneys General of 13 States filed an amicus brief in *DeBlasio* urging the Court to grant review.[1]

The results in these cases make clear that this conflict cannot be brushed aside as a mater of mere semantics. In *DeBlasio, Bensalem Township* and earlier Third Circuit decisions such as *Bellow v. Walker,* 840 F.2d 1124 (3d Cir.), *cert. denied,* 488 U.S. 851 (1988), substantive due process claims proceeded despite the absence of any evidence, or even allegation, that the conduct at issue was so extreme as to shock the conscience. In contrast, the First Circuit and other courts applying the "shocks the conscience" standard have never permitted a substantive due process claim to go forward in the land use context. As demonstrated, the choice of standards was determinative here. (Petition for Certiorari at 14-15.)

The courts of appeals themselves have underscored the need for guidance on the proper standard to apply in substantive due process challenges to land use determinations. *See DeBlasio,* 53 F.3d at 598; *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1217 (6th Cir. 1992) (noting "remarkable" lack of uniformity in standards governing substantive due process land use claims). Thus, respondents are simply wrong in asserting that the law is settled and clear on this question. Indeed, the decisions of this Court on which respondents rely predate the court of appeals decisions calling for guidance. Decisions of this Court involving land use regulation have never applied a "shocks the conscience" test. *See Dolan v. City of Tigard,* 114 S. Ct. 2309, 2320 n.8 (1994)

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[1] If certiorari is granted in *DeBlasio* or any of the other pending petitions noted in the text, the instant case should be held pending disposition of the granted case.

(where city makes "adjudicative decision to condition petitioner's application for building permit on an individual parcel . . . the burden properly rests on the City" to show land use regulation is not an arbitrary restriction); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (land-use regulations violate the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare"); *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928). The decisions respondents cite are of limited utility because none involved alleged deprivations of real property. Real property cases simply do not present any of the difficult issues, identified by respondents, of deciding to recognize new and previously unacknowledged fundamental rights.

With respect to Jolicoeur's just compensation claim, respondents make no effort to defend the Rhode Island Supreme Court's insupportable holding. There is no doubt that the Rhode Island Supreme Court is both wrong and in conflict with numerous other courts in holding that Fifth Amendment takings claims may not be brought pursuant to 42 U.S.C. § 1983. Instead, respondents argue that Jolicoeur was fully compensated for the taking of his property because, although it was denied prejudgment interest for almost two and a half years, during the taking, Jolicoeur was allegedly at fault for not submitting satisfactory building plans until late 1989. However, from August 1987 until the court order in 1989 requiring them to review Jolicoeur's plans, respondents refused to consider numerous sets of plans tendered by petitioners—at one point physically throwing a set of plans out of the planning department office. In any event, whether the state breach of contract remedy provided full compensation to Jolicoeur and, if so, whether it precludes a just compensation claim, was never considered by the Rhode Island Supreme Court. That issue could easily be resolved on remand after a decision by this Court on

the question whether a Just Compensation claim may be brought in state court pursuant to Section 1983. Respondents' arguments do not justify leaving the Rhode Island Supreme Court's patently wrong ruling on that question undisturbed. As matters now stand, Rhode Island's citizens may not invoke Section 1983 to bring Fifth Amendment takings claims in state court.

Respectfully submitted,

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